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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

VIVIAN SPRYNCZYNATYK and
PAUL SPRYNCZYNATYK,
Petitioners,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DARRELL PANETHIERE
Law Offices Of Windle Turley, P.C.
1000 University Tower
6440 N. Central Expressway
Dallas, Texas 75206
214/691-4025
Counsel for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court in a diversity action is bound by a state rule that hypnosis affects the credibility of a witness but not the admissibility of his testimony.

2. Whether a federal court sitting in diversity may reject a state's prior determination that an issue is one concerning competency of a witness to testify, thus requiring the application of state law, and hold instead that the issue is simply one of the "admissibility of evidence" governed by federal law.

3. Whether conflicting rules for the admission of hypnotically-aided testimony in civil cases as now exist in the Eighth and Ninth Circuits should be harmonized.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

This petition seeks review of the judgment of the United States Court of Appeals for the Eighth Circuit in this personal injury action brought under the diversity jurisdiction of the United States District Court for the District of North Dakota. The opinion of the Eighth Circuit holds that the admission of videotapes of a hypnosis session involving an important plaintiffs' witness was prejudicial error in that it was introduced during plaintiffs' case-in-chief without a proper cautionary instruction. The Court further held that the testimony of that witness could not be received without a pre-trial inquiry into the circumstances and nature of the hypnosis administered. (See Appendix A).

This Petition does not challenge the ruling on the admission of the videotapes. Instead, Petitioners seek review of the Eighth Circuit's decision to establish procedures for the admission of hypnotically-aided testimony which were previously rejected by the North Dakota Supreme Court on this issue of competency which must be governed by state law. Fed.R.Evid. 601. Petitioners submit that the proper interpretation of Rule 601 is an important question of federal law which has not been, but should be, settled by this Court.

OPINIONS BELOW

The judgment of the court of appeals is reported at 771 F.2d 1112 (App. A). The judgment and memorandum opinion of the district court are unreported (App. B & C).

JURISDICTION

The decision of the Court of Appeals was rendered on August 16, 1985. Petition for Rehearing and Suggestion for Rehearing En Banc were timely filed on August 29, 1985. Both were denied by Order of the Eighth Circuit entered September 17, 1985. This Petition is filed within 90 days of that Order as per 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This Petition concerns the proper interpretation of Federal Rule of Evidence 601. That Rule provides as follows:

RULE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State Law.

STATEMENT OF THE CASE

The accident that forms the basis of this lawsuit occurred at approximately 8:00 p.m. on July 16, 1980, on a gravel road near Bismarck, North Dakota. Rodney Sprynczynatyk was driving his mother, Vivian, home in the family-owned 1980 Chevrolet Citation X-car when, just after starting down an 11% grade, the car experienced steering difficulties. Rodney Sprynczynatyk was unable to control the car and when he applied pressure to the brakes, the car suddenly spun and overturned, coming to rest on its top in the steep roadside ditch. Vivian Sprynczynatyk sustained injuries which rendered her quadriplegic.

Prior to trial Rodney was hypnotized by a trained psychologist, Dr. Robert Gordon, who instructed Rodney that he could reach back and recollect the details of the day of the accident. Under hypnosis Rodney recalled applying his right foot to the brakes as hard as he could before the car spun and left the gravel road. Prior to the hypnotic session Rodney had stated that he could have used the brakes but to the best of his recollection he did not apply them. After undergoing hypnosis Rodney

was deposed and testified that he did recall applying the brakes just before the car started to spin.

Suit was filed in the United States District Court for the District of North Dakota pursuant to 28 U.S.C. § 1332(a). At trial a videotape of Rodney Sprynczynatyk's hypnotic session was shown to the jury. At GM's request the Court gave the following oral instruction to the jury:

> THE COURT: Ladies and gentlemen, the tapes that you are about to see are being received on the issue of—the ultimate issue of the credibility of the recall of the witness, Rodney Sprynczynatyk, and we aren't here—the purpose of them is to permit you to see it and you will be receiving other evidence on this subject both on the part of the plaintiff and contrary evidence from the defendant. And the purpose of viewing the tapes is to permit you to evaluate the opinions that you will subsequently hear.

The evidence at trial established that the accident occurred because the Sprynczynatyks' X-car experienced premature rear-wheel lockup, a condition caused by the aggressive rear-wheel brake linings used in GM's design of the car. The evidence further showed that although rear-wheel The evidence further showed that although rear-wheel lockup was an extremely dangerous defect whose effects were well-known to those involved in braking design, GM marketed the X-car without warning even after it acquired actual knowledge of the dangerous defect.

The jury returned its verdict on liability in the Sprynczynatyks' favor and, after a trial on damages, awarded Vivian Sprynczynatyk $4,500,000 and her husband, Paul Sprynczynatyk, $525,000. The trial court rendered judg-

ment on the $5,025,000 award but, as noted, the Eighth Circuit reversed and remanded for a new trial.

The Eighth Circuit held that the admission of videotapes of Rodney's hypnosis session was prejudicial error in that it was introduced during plaintiffs' case-in-chief without a proper cautionary instruction. The Court also held that Rodney's testimony could not be received without a pre-trial inquiry by the court into the circumstances and nature of the hypnosis administered. (See Appendix A).

Petitioners here seek review of the Eighth Circuit's decision to establish procedures for admitting hypnotically-aided testimony where such procedures were previously rejected by the North Dakota Supreme Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. THE DECISION OF THE EIGHTH CIRCUIT HEREIN TO CREATE A FEDERAL RULE OF COMPETENCY DIRECTLY OPPOSED TO THE RELEVANT STATE RULE INDICATES THAT THERE IS SUBSTANTIAL CONFUSION AS TO THE NATURE AND EXTENT OF RULE 601's MANDATE THAT STATE RULES OF COMPETENCY SHALL BE APPLIED IN DIVERSITY ACTIONS.

The opinion of the Eighth Circuit in this cause correctly notes that the district court had permitted Rodney Sprynczynatyk to testify as to his post-hypnotic memory "because North Dakota is one of the jurisdictions which has held that hypnosis affects credibility but not admis-

sibility." (771 F.2d 1112, 1122, citing *State v. Brown,* 337 N.W.2d 138, 153 (N.D. 1983)). The district court was correct in permitting the testimony because deference to state law on this question is specifically mandated by Federal Rule of Evidence 601, and, even in the absence of Rule 601, would arguably be required by the rule of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938).

The rule of *Erie* is clear and, in its general outlines, has not changed in over 40 years: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law." 304 U.S. at 78.

The opinion filed in this case on a matter of substantive law is directly opposed to the opinion of the Supreme Court of North Dakota, sitting en banc, in *State v. Brown.* Those persons who bring diversity actions in the district of North Dakota are entitled to rely on the law of that jurisdiction as enunciated by its highest court. *Erie* requires this result and the Eighth Circuit has erred in adopting a rule for the reception of hypnotically-aided evidence which has been categorically rejected by the Supreme Court of North Dakota. *Brown, supra,* 337 N.W.2d at 153.

The Eighth Circuit's decision not to apply North Dakota law on this point is based on a faulty syllogism. 771 F.2d at 1122-23. It may be rendered as follows:

1. "[I]ssues of admissibility of evidence are questions of federal law."

2. "[W]e do not view this issue as a competency question but as an evidentiary problem. . ."

3. Therefore, the admissibility of the evidence is governed by federal law.

The first term of this syllogism is demonstrably incorrect, the second term is meaningless, and the resulting conclusion is clearly erroneous, incompatible with Rule 601, and constitutionally impermissible.

1. *The first term*: The Eighth Circuit opinion states as its premise that, "issues of admissibility of evidence are questions of federal law." 771 F.2d at 1122. There is no recognition that the traditional law in federal courts for decades, prior to the adoption of the federal rules, was directly opposite. The district courts applied whichever rule of evidence favored admissibility, be it state or federal. Fed.R.Civ.P. 43(a), repealed 1975. Wright & Miller, *Federal Practice & Procedure* § 2406 (1977). As a general rule this meant that state law of admissibility most often governed. *Id.*, § 4512, p. 190. And the principal concern when the federal rules were adopted was not that federal law would henceforward govern questions of admissibility (assuming even the constitutional authority to legislate such a result). Rather, concern was expressed in the committee hearings that Rule 601 could be read to require the application of state law to *all* questions of admissibility.[1]

There are literally hundreds of cases in which the federal courts of appeal have recognized that state law

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1. "The word 'competence' is often used as a synonym for 'admissibility,' in addition to the usage intended here--qualification to testify. It might be useful to indicate that Congress does not intend all state law on admissibility to apply in diversity actions." Hearings on Proposed Rules of Evidence Before the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary, 93d Cong., 1st Sess., ser. 2 (Supp.), at 201, 203 (1973), letter of July 16, 1973, Professor Kenneth W. Graham, Jr. to Rep. Hungate, quoted in Louisell & Miller, *Federal Evidence* § 253, p. 28 (1978), and in 3 Bailey & Trelles, *The Federal Rules of Evidence* 203 (1980).

may govern the admissibility of evidence in specific situations. *See, e.g., Rexrode v American Laundry Press Co.*, 674 F.2d 826, 831, n. 17 (10th Cir. 1982), *Kirshner v. Broadhead,* 671 F.2d 1034, 1039 (7th Cir. 1982). The opinions of the Eighth Circuit, prior to the instant case, were consistent with the nationwide practice, and have on many occasions recognized that state law governs questions of the admissibility of evidence in diversity cases. See, *e.g., Randy v. Honeywell, Inc.*, 540 F.2d 932, 936-7 (8th Cir. 1976) [state law applied on admissibility of expert testimony on inflation]; *Potter v. St. Louis-San Francisco Ry. Co.*, 622 F.2d 979, 983 (8th Cir. 1980) [state law applied on admissibility of evidence on condition of railroad crossing and inferences to be drawn therefrom]; *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 723 (8th Cir. 1976) [federal court bound by state rule excluding expert testimony on effect of future inflation].

Indeed, it appears to be the general rule that except in matters of constitutional magnitude the state law of admissibility of evidence is controlling. *Olson v. Green,* 668 F.2d 421 (8th Cir. 1982); *Jones v. Wyrick,* 415 F.Supp. 108 (E.D. Mo. 1976), aff'd 542 F.2d 1013 [questions relating to admissibility of evidence are usually a matter of state law and procedure]; *Shaw v. Gathwright,* 487 F.Supp. 459 (E.D. Va. 1980) [admissibility of evidence is generally a matter of state law].

It has been specifically recognized that *Erie* requires certain questions of the admissibility of evidence to be governed by state law. In *Greiner v. Volkswagenwerk A.G.*, 540 F.2d 85 (3rd Cir. 1976), the Third Circuit held that "on an issue of the admissibility of evidence of an automobile driver's intoxication, *Erie R. Co. v. Tompkins* compels us to follow the law of Pennsylvania." 540 F.2d

at 89 [citation omitted]. *Erie* should also have compelled the Eighth Circuit to apply the substantive law of North Dakota on the issue of whether hypnotically-enhanced testimony can be admitted in a diversity trial, whether the issue is characterized as a question of competency, credibility, or admissibility of evidence. See, Wright & Miller, *supra*, § 4509, p. 141.

Some courts have noted the importance of applying state law of evidence in diversity cases when the evidentiary issue is "outcome determinative." The application of state law in such cases would so affect the consequences of judgment as to be inseparable from substantive law. *Lux v. McDonnell Douglas Corp.*, 579 F. Supp. 1036 (N.D. Ill. 1984). Also, the application of state law prevents the unfairness of having a materially different result of litigation depend upon whether the suit was brought in federal court. The "outcome determinative" test is clearly relevant in this case since the Eighth Circuit has now created a two-tiered system whereby evidence which is clearly admissible in North Dakota courts will be considered presumptively inadmissible in federal diversity cases. Certiorari should be granted in order to avoid creating this anomalous situation.

The fact that the Eighth Circuit's newly-propounded rule requires corroboration of at least some element of the hypnotized witness' testimony is the strongest evidence that the newly-minted rule is in fact substantive. 771 F.2d at 1112-24. All other rules requiring corroboration are so considered because they fundamentally alter the quantum of proof necessary to the proponent's case. See 7 Wigmore, *Evidence* §§ 2070-75 (Chadbourn rev. 1978);

McCormick, *Evidence* § 158 (2d ed. 1972); Wright & Miller, *Federal Practice & Procedure* § 5200, p. 227 (1977).

The instant opinion well illustrates the warning sounded by Wright & Miller after the adoption of the Federal Rules of Evidence: "[T]he enactment of the Evidence Rules increases the possibility for conflict between state and federal evidence rules in diversity cases . . . [D]espite *Hanna* [*v. Plummer,* 380 U.S. 460 (1965)] and the enthusiastic claims of some writers as to its effects, federal courts must still struggle with *Erie* problems under the Evidence Rules." 22 *Federal Practice & Procedure* §§ 5201-2, pp. 231, 237 (1977). This Court has noted that the twin aims of the *Erie* rule are the "discouragement of forum shopping and the avoidance of inequitable administration of the laws." *Hanna, supra,* 380 U.S. at 468. The result mandated by the Eighth Circuit herein frustrates both purposes of the *Erie* rule. The instant opinion fails to deal with the implications of *Erie,* violates the rule of that case, and should for those reasons be reviewed.

2. *The second term*: The second term of the Eighth Circuit's syllogism, which draws a distinction between "a competency question" and "an evidentiary problem," is meaningless. 771 F.2d at 1122. All of the cases on this point, civil and criminal, recognize that the issue to be decided is whether the challenged evidence relates to competency or to credibility. *See, e.g., Kline v. Ford Motor Corp.,* 523 F.2d 1067, 1069 (9th Cir. 1975); *State v. Brown, supra,* 337 N.W.2d at 151. No previous opinion has felt the need to create a third category.

Whether considered a question of competency or credibility, the Petitioners' position on this appeal is correct. If the testimony of a once-hypnotized witness is felt to present a question of credibility, then a district court is

correct in submitting the issue to the jury. If competency is involved, then the district court is required, pursuant to FRE 601, to apply the relevant state law. Since North Dakota law requires submitting the issue to the jury as one of credibility, no error can be attributed to the district court herein. The instant opinion concedes that this issue, if considered to be one of competency, would be governed by North Dakota law, and that such law would allow the evidence to be admitted. 771 F.2d at 1122, citing *Brown, supra.*

Where courts have referred to the "admissibility of evidence" it has often been used as a synonym for competency:

> Our rules of evidence do not provide that a previously hypnotized witness is incompetent to testify. We believe that an attack on credibility is the proper method of determining the value of hypnotically induced testimony. Accordingly, we align ourselves with the majority of jurisdictions which have held that hypnosis affects credibility but not admissibility.

Brown, supra, 337 N.W.2d at 151. (*See also, supra*, n. 1).

It is submitted that this excerpt from *Brown* reflects the universal usage of the terms by the many courts which have addressed the hypnosis issue with the single exception of the Eighth Circuit. Only that Court has divined another category in which the issue may be addressed. To every other court, the question is resolvable as either one of competency (and therefore for the court to decide, applying state law) or of credibility (a jury question).

Competency is one of the many areas of admissibility which a court may have to decide before a witness may testify. FRE 104(a). Hence, the reference by the North

Dakota Supreme Court in *Brown* to the competency issue as one of admissibility. It is a very eccentric usage for the Eighth Circuit to say that the issue is one of admissibility and, for that reason, *not* an issue of competency. 771 F.2d at 1122. The two terms are not mutually exclusive; indeed, they often refer to the very same thing. By contrast, competency and credibility *are* mutually exclusive; just as credibility and admissibility are mutually exclusive. The Eighth Circuit's opinion depends for its entire logical force on the belief that admissibility of evidence and the competency of witnesses are mutually exclusive concepts.

To state, as the Eighth Circuit does, that the issue here is "an evidentiary problem" or an issue of "admissibility" says nothing. Every one of the issues which the opinion concedes would be governed by state law (burden of proof, privilege, etc.) are undeniably "evidentiary" problems and the issues only manifest themselves at the point where their admission into evidence is sought. Neither phrase provides any basis for deciding whether the admission of hypnotically enhanced testimony should be governed by state law or federal law. Of course the issue is one of admissibility and, thus, it is inevitably an evidentiary problem. That does not mean that federal law governs.

3. *The conclusion*: Since the hypnosis question is one of admissibility, generally speaking, it was proper for the trial court to decide whether Rodney could testify in this case. FRE 104(a). However, the particular admissibility issue raised is one of competency. Therefore the court in deciding the admissibility issue was required by Rule 601 to apply state law where, as here, the state law supplies the rule of decision. North Dakota law unequivocally holds that Rodney is competent to testify and that

the fact of his hypnosis only affects his credibility in the eyes of the jury. Thus, the federal district judge was correct in allowing him to testify. The Eighth Circuit, on the other hand, erred in reversing that decision, in finding that the issue was neither one of competency nor of credibility, and in creating a new category of "admissibility of evidence" issues which will always be governed by federal law regardless of conflicts with the rules of evidence, conflicting state rules, or the *Erie* doctrine. 771 F.2d at 1123.

The approach of the Eighth Circuit in adopting this new rule, previously rejected by the North Dakota Supreme Court, is the classic common law formulation of a new rule of substantive law. This law-making function is categorically denied to a federal court exercising a diversity jurisdiction. *Erie, supra*, 304 U.S. at 78.

Rule 601 specifically states that federal law does not govern; *Erie* clearly implies that the state's interest in the application of its substantive law is of constitutional dimension. The Eighth Circuit's decision to ignore both of these sources of law, as well as conflicting authority from the Ninth Circuit (Section III, *infra*), has led to an undesirable confusion in the law which should be corrected by this Court.

II. THE EIGHTH CIRCUIT WAS ALSO BOUND BY NORTH DAKOTA'S RULE THAT THE QUESTION OF WHETHER A HYNOTICALLY TREATED WITNESS MAY TESTIFY DOES NOT CONCERN THE ADMISSIBILITY OF A WITNESS' TESTIMONY.

The Eighth Circuit has violated Rule 601, and possibly the *Erie* doctrine as well, in two respects. As demonstrated above, it has ruled that Rodney Sprynczynatyk was in-

competent to testify where North Dakota would clearly hold him competent. But on a more fundamental level, the Eighth Circuit has erred by failing even to recognize that it is bound by North Dakota's determination that "hypnosis affects credibility but not admissibility." *Brown, supra,* 337 N.W.2d at 151. Stated differently, the Eighth Circuit is first bound by North Dakota's determination that the issue raised on this appeal does concern whether or not Rodney Sprynczynatyk was a competent witness. It is thereafter further bound by North Dakota's determination that a witness such as Rodney is competent. Thus, the Eighth Circuit violated Rule 601 by holding that the question of Rodney's testimony did not involve competency. It thereafter failed to rule directly whether or not Rodney was competent, stating only that his testimony was "inadmissible". This is clearly a tautology. A definite reservation to the states of their right to prescribe standards of competency has been violated by the simple expediency of redefinition. This is also prohibited by Rule 601 where the relevant state law, as here, has already defined the issue.

Petitioners concede that the argument raised under this subsection does not appear to have been addressed by any decided case, perhaps because of the relative newness of the federal rules of evidence. However, Wright & Miller, have acknowledged that the language of Rule 601 appears to mandate the result for which Petitioners argue herein. In discussing FRE 104(a), which requires that the determination of preliminary questions be made by the trial court, the following observations are made:

> The impact of Rule 104(a) on the determination of preliminary facts where the evidence is admitted under state law is unclear. Since Congress did not

> amend Rule 104(a) when it altered the Rules to require the federal courts to honor state privileges and rules of competence, it can be argued that Rule 104(a) applies and that Congress had no intent to import state regimes for the determination of preliminary facts into the Evidence Rules. On the other hand, the language of Rule 501 and Rule 601 is that privilege and competency "shall be determined in accordance with State law." *This can be read as including not only the state rule of privileges and competency, but also the state method of determining this issue.*

Federal Practice & Procedure, Vol. 21, § 5055, p. 278 (1977) [emphasis added.] The North Dakota method of determining the competency of a previously-hypnotized witness is to allow the testimony with the fact of hypnosis affecting only the credibility of the witness before the jury. *Brown, supra.* The Eighth Circuit has ordered, to the contrary, that in diversity cases the district court shall independently determine competency in advance of testimony on the basis of specific factors (drawn from the case of *State v. Hurd*, 432 A.2d 86, 92-93 (N.J. 1981)) which have been specifically rejected by the North Dakota Supreme Court. *Brown, supra*, 337 N.W.2d at 149-50, criticizing *Hurd*.

This aspect of the present appeal was not anticipated by any party and only arose when the Eighth Circuit filed its opinion. Petitioners could not foresee that the Eighth Circuit would abandon the competency/credibility dichotomy employed in the dozens of hypnosis cases cited to it and invent its own third category of issue ("admissibility of evidence"). Nor could they anticipate that the Eighth Circuit would, despite Rule 601, consider itself free to ignore North Dakota's previous decision that this issue

did not involve admissibility. Thus the novel issue under Rule 601 isolated by Wright & Miller above has only now surfaced in this appeal. It provides an additional reason why certiorari should be granted in this case.

III. REVIEW SHOULD BE GRANTED IN ORDER TO HARMONIZE THE POSITIONS OF THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEAL.

Before the instant appeal, every civil case which had addressed the issue of the admissibility of hypnotically-aided testimony had ruled that the question was one of credibility for the jury. The witness was, without more, competent. Like the criminal cases on the subject, each civil case was decided on the basis of the particular evidentiary problem confronted, and not on the global principle that "issues of admissibility of evidence are questions of federal law." 771 F.2d at 1122.

The importance of the federal civil cases which have considered this exact question is obvious and it is incredible that the Eighth Circuit wholly ignored the only two cases which have addressed the issue. Since both cases, *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974), and *Kline v. Ford Motor Corp.*, 523 F.2d 1067 (9th Cir. 1975), apply state law, not federal law, in determining that the admission of hypnotically-aided testimony is not error, the Eighth Circuit's failure to address those cases is particularly regrettable.

The resulting conflict among the circuits is an additional reason why certiorari should be granted in this case. Consider the anomaly: had this case been originally filed in California, the Ninth Circuit would have applied the state law of North Dakota finding Rodney Sprynczy-

natyk competent to testify, but the federal district court in North Dakota cannot apply that state's rule and must instead follow the newly-minted Eighth Circuit standard on the reception of hypnotically-aided testimony which presumes that Rodney is incompetent to testify. *Wyller, supra,* and *Kline, supra* are directly opposed to the opinion of the Eighth Circuit herein. They are, moreover, correctly decided. (See section IV *infra*). Indeed, the Eighth Circuit itself has recently recognized that *Kline* is the leading civil authority on hypnosis evidence. See, *United States v. Harvey,* 756 F.2d 636, 645 (8th Cir. 1985). Since these cases are unanimous in their support of the Petitioners' position, were specifically relied on by the Petitioners below, and are the only two cases nationwide, state or federal, which are fully on point, this case should be reviewed in order for this Court to consider and rationalize the contrary positions of the Eighth and Ninth Circuits.

IV. THE DECISION BELOW IS BASED ON A MISREADING OF THE RELEVANT AUTHORITIES, IS INCORRECTLY DECIDED, AND SHOULD BE REVIEWED TO CORRECT THE ERRORS OF THE EIGHTH CIRCUIT.

Every case involving testimony aided by hypnosis on which the opinion below relies is a criminal case. The present appeal arises from a civil action. Yet the opinion refuses to acknowledge the fundamental inapplicability of most criminal authority to the present appeal.

Because of the many constitutional limitations on the reception of evidence in criminal trials, the authorities relating to that field are rarely applicable in the civil area. In particular, the Sixth Amendment right of confrontation, the Fifth Amendment and Fourteenth Amend-

ment right to due process of law, the Fifth Amendment protection against self-incrimination, and the common law concept of proof beyond a reasonable doubt, are all unique to the criminal law and each places substantial limits on the kind and quality of evidence that may be received.

Many of the cases cited in the opinion base their holding on a specific constitutional requirement such as the Confrontation Clause, *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266, 1273 (1982), or due process, *United States v. Valdez*, 722 F.2d 1196, 1203 (5th Cir. 1984). All of the others are limited to the criminal situation by language or logic. *See, e.g., State v. Mack*, 292 N.W.2d 764, 772 (Minn. 1980) [hypnosis evidence "may not be admitted in a criminal proceeding."]

In cases where hynotically-aided testimony has been successfully challenged, it has always been challenged on the basis of a constitutional or procedural right peculiar to the criminal defendant. Thus, the holdings of those cases are only useful to the present appeal to the extent that their reasoning may be applied by analogy. The same is not true of the criminal cases which have admitted such evidence. Each of the many criminal cases in which hypnosis has been successfully used is authority for the Petitioners' position. That is, evidence which passes all of the manifold challenges to competency and trustworthiness found in the criminal trial, is, *a fortiori*, competent and trustworthy in the freer world of civil evidence.

It is difficult to judge which, if any, of the safeguards thought necessary for the admission of the evidence in a criminal case would be relevant in a civil case where there are not due process and confrontation rights in jeopardy. The Eighth Circuit's view that five carefully-defined factors must be met is simply insupportable. 771

F.2d at 1123. *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981), specifically acknowledged that its holding was limited to the criminal area and, in speculating as to what safeguards might be necessary in the civil area, made reference to only one factor: "[W]e believe that a recording of the session is essential; otherwise the opponent will have no effective way to challenge the credibility of the testimony at trial." *Hurd*, 432 A.2d at 97, n. 6. This one essential safeguard is present in this case. The argument that *Hurd* stands for anything more in the present civil action, or that any other case has mandated further safeguards, is simply groundless.

It is extremely disingenuous of the instant opinion to discuss the *Hurd* safeguards at great length and to "adopt a version of the *Hurd* safeguards" without even acknowledging that *Hurd* itself realized that different standards were appropriate in the civil area and specified what those standards should be. 771 F.2d at 1123. This is not an appeal of a criminal conviction. *Every* hypnosis authority on which the opinion relies, without exception, is a criminal case; *every* civil case ruling the issue has been ignored.

A further problem with the Eighth Circuit's total reliance on criminal law authority stems from the differing standards of proof inherent in each area. The beyond a reasonable doubt standard of proof is universally applied to the ultimate question of guilt or innocence in a criminal trial, but the same strict standard is often used in the determination of pretrial and other preliminary questions of fact, such as the admissibility of the hypnotically refreshed testimony challenged herein.

> [C]ourts have recently varied the standard of proof according to the nature of the case before them. In civil cases the preponderance standard, the normal

> standard of proof for ultimate civil trial issues, has been deemed appropriate. In criminal cases, the fact that the prosecution must prove guilt beyond a reasonable doubt has sometimes led to adoption of a similar standard for preliminary fact questions . . . Thus, the preponderance standard may be acceptable for ordinary factual dispositions, but a beyond a reasonable doubt standard is required at the drop of a constitutional issue in order to show proper respect for fundamental law.

Saltzburg, "Standards of Proof and Preliminary Questions of Fact," 27 Stan.L.Rev. 271, 273-4 (1975). The fact that a court may have condemned the use of hypnosis in a criminal case tells us nothing about the validity of such evidence in a civil case in the absence of detailed analysis of that jurisdiction's standards of proof for preliminary questions of fact in both civil and criminal cases. The instant opinion fails to engage in such analysis and thus fails to demonstrate even a minimal nexus between its criminal law authority and this civil case. It is entirely possible, if not in fact likely, that most of the criminal cases upon which the opinion relies are applying the beyond a reasonable doubt standard of proof to the preliminary question of whether the hypnotically-aided testimony is credible or competent. This is inappropriate in a civil case, and there is no legitimate policy of law served by arbitrarily favoring a civil defendant in this manner. There is certainly no basis for a federal court sitting in diversity to mandate such a policy which is unprecedented and directly opposed to the law of the State of North Dakota.

As noted above, every criminal case which has approved the use of hypnosis is authority for the Petitioners. The standard of proof that may have been employed is

irrelevant, for if the testimony has been determined to be credible beyond a reasonable doubt, then, *a fortiori,* it will satisfy the civil test of being credible by the preponderance of the evidence.

While the application of the beyond a reasonable doubt standard is implicit in all of the Eighth Circuit's authorities, several cases have acknowledged this fact: "[T]he party seeking to introduce hypnotically-refreshed testimony [must] establish compliance with the requirements for admissibility *by clear and convincing evidence.* This standard we think is appropriate in criminal cases to obviate the potential for abuse of hypnosis, to ensure reliability, and to avoid injustice." *State v. Beachum,* 97 N.M. 682, 543 P.2d 246, 254 [1981] [emphasis added]. Cf. *Hurd,* 432 A.2d at 97, n. 6.

The instant opinion also creates a new requirement as to who has the burden of proof on the admission of hypnotically-aided testimony. The burden of proof is a carefully regulated concept in criminal law where the due process and confrontation rights of the criminal defendant are in danger of being infringed. However, even in the criminal law, the burden is squarely on the defendant to prove matters such as the suggestiveness of an identification procedure. *Neil v. Biggers,* 409 U.S. 188, 196, 93 S.Ct. 375, 380, 34 L.Ed.2d 401 (1972). Yet, the Eighth Circuit has decided, on no discoverable authority, that plaintiffs in this case were affirmatively required to prove that their witness' testimony had not been suggestively obtained. 771 F.2d at 1123. There is no basis in the law for this position, and certiorari should be granted in order that this additional error may be corrected.

Finally, the opinion's attempt to mandate a "corroboration" requirement is unjustified and based on an obvious

misreading of the criminal authorities. There is a general rule in rape prosecutions which requires special corroboration of the testimony of the prosecutrix. *See*, Annot., Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense, 31 A.L.R. 4th 120 (1983). Although the opinion several times observes that courts dealing with the role of hypnosis in a criminal case have required the testimony to be "corroborated" as a procedural safeguard (771 F.2d at 1122, 1123-4), it fails to note that many of the cases on which reliance is placed were prosecutions for rape or other sexual offense. The misleading impression is thus created that something other than the preexisting corroboration requirement is being called form. The distinction, though valid, is somewhat subtle and has escaped the notice of at least one other appellate court. *See Greenfield v. Commonwealth,* 214 Va. 710, 204 S.E.2d 414 (1974):

> The *Greenfield* court also remarked that the *Harding* court had emphasized the fact that the previously hypnotized witness' testimony in the earlier case was substantially corroborated by other evidence. This remark is inapt, however, since . . . the *Harding* court's allusion to *corroboration* pertained to the sufficiency of the evidence to support a conviction of attempted rape, rather than to the admissibility of the witness' hynotically induced memories.

Annot., "Admissibility of Hypnotic Evidence at Criminal Trial," 92 A.L.R. 3d 442, 454, n. 45.

General Motors' argument for a special corroboration requirement in hypnosis situations was simply an invitation for the Eighth Circuit to repeat the error of the Virginia Supreme Court in *Greenfield*. Unfortunately, the invitation was accepted.

If corroboration is to be required, then certiorari should also be granted in order to resolve the extreme difference of opinion among the parties as to what form the corroboration must take. Even in rape cases, "the corroboration need only consist of circumstances which tend to support the victim's testimony." *Fitzgerald v. United States,* 412 A.2d 1 (D.C. 1980). Rodney Sprynczynatyk's testimony was fully corroborated, even under the criminal law standard, by the physical evidence of the accident produced at trial. Respondent's novel view of corroboration, that every fact to which Rodney testified must also be established by independent evidence, is nothing less than an attempt to create a new rule of law parallel to those archaic laws which required two or more witnesses to attest to a particular fact. The principle underlying such laws was fully criticized by Blackstone over two hundred years ago. 3 *Commentaries* 370, 4 *Commentaries* 350 (1767).

The assumptions of the Eighth Circuit regarding corroboration turn the common law on its head. Wigmore notes that rules requiring more than one witness to a fact are a feature of the civil law, are inimical to the common law, and, where found, must be justified by overwhelming policy reasons. He summarizes this area of the law of evidence as follows: "In general, the testimony of a *single witness,* no matter what the issue or who the person, *may legally suffice as evidence upon which the jury may found a verdict. [A]ll rules requiring two witnesses* or a *corroboration of one witness,* are exceptions to the general principle." 7 Wigmore, *Evidence* §§ 2034, 2036 (Chadbourn rev. 1978) [emphasis in original]. The Eighth Circuit invokes no policy or authority for its enactment of a two-witness, or corroboration, rule in civil cases where

hypnosis is an issue. Certiorari should be granted in order that this regressive requirement be avoided.

The ultimate standards for the admission of evidence in civil cases are simply less strict than in criminal cases. It is not that truth is any less valued in the civil area. It is rather that criminal defendants must be protected from the effects of unfair or unjust evidence, even though that evidence may meet civil standards of trustworthiness or may even, in some exclusionary rule cases, be undeniably true. "Since our society has chosen to give criminal defendants the benefit of all reasonable factual doubts—a benefit not usually conferred upon civil litigants—rules of evidence may be tailored in a principled way to reflect and support this choice." Saltzburg, *supra,* 27 Stan.L.Rev. at 304. The Eighth Circuit in the instant appeal has taken a reasonable question of fact away from the jury in order to resolve preliminary factual doubts in favor of the civil defendant. The only result of this restriction is to limit the amount of relevant and truthful evidence that may be adduced in a civil action without any justification similar to the confrontation and due process clause considerations which serve to limit the proof in criminal cases.

The civil authorities of the Ninth Circuit are unanimous in their support of the Petitioners' position on this point. Certiorari is in order so that the Eighth Circuit's dissenting position may be reconciled and justice done.

CONCLUSION

For the foregoing reasons, the Petitioners, Vivian and Paul Sprynczynatyk, pray that this Honorable Court grant this Petition For Writ of Certiorari, and, upon review, reverse the decision of the Eighth Circuit Court of Appeals, and reinstate the judgment entered on behalf of plaintiffs by the District Court for the District of North Dakota.

Respectfully submitted,

DARRELL PANETHIERE
LAW OFFICES OF WINDLE TURLEY, P.C.
1000 University Tower
6440 N. Central Expressway
Dallas, Texas 75206
Counsel for Petitioners

APPENDIX A

Vivian SPRYNCZYNATYK and Paul Sprynczynatyk,
Appellees/Cross-Appellants.

v.

GENERAL MOTORS CORPORATION,
Appellant/Cross-Appellee.

Nos. 84-1566, 84-1611.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 14, 1985.

Decided Aug. 16, 1985.

Rehearing and Rehearing En Banc
Denied Sept. 17, 1985.

Before HEANEY, ROSS and FAGG, Circuit Judges.

ROSS, Circuit Judge.

Appellant and cross-appellee General Motors Corporation (GM) appeals from a final judgment entered in the United States District Court for the District of North Dakota based upon a jury verdict in an automobile product liability and negligence action brought by appellees and cross-appellants, Vivian Sprynczynatyk and her husband Paul Sprynczynatyk (Sprynczynatyks or plaintiffs). The Sprynczynatyks were awarded $5,025,000 in actual dam-

ages from GM. We reverse and remand with directions to the district court to conduct further proceedings consistent with this opinion.

FACTS

On July 16, 1980, at approximately 8:00 p.m. a one car accident occurred on a gravel road near Bismarck, North Dakota. Fourteen-year-old Rodney Sprynczynatyk (Rodney) was driving the family-owned 1980 Chevrolet Citation X-car. Rodney, who had obtained his learner's permit 2 or 3 weeks earlier, was accompanying his mother, Vivian Sprynczynatyk (Vivian) on some errands that evening. During the return trip to their house, Vivian, who had been driving, stopped and let Rodney drive the car. Rodney had driven the Citation a number of times before.

After Vivian turned the operation of the car over to Rodney, he drove approximately one mile on paved Highway 1804 and then turned north onto a gravel road. As Rodney started down a hill (approximately 11% grade), he encountered difficulties controlling the car. At some point the car left the road on the right (east) side, overturned, and came to rest on its top with the front of the car facing south. Vivian sustained injuries which rendered her quadriplegic.

Vivian and her husband Paul filed this action in district court against GM, the manufacturer of the 1980 Citation. The plaintiffs brought this action based upon theories of negligence and strict liability. They alleged that the Citation had either defectively and unreasonably dangerous or negligently designed brakes or both. The Sprynczynatyks contended that the rear brakes on the Citation locked causing the car to spin around 180° and

roll as it tipped over into the east ditch. GM denied the alleged brake defect and disputed plaintiffs' theory of how the accident occurred. GM contended that Rodney did not apply the brakes, and even if he did they didn't lock, but that Rodney merely panicked as a young inexperienced driver and oversteered the car off the road.

Vivian sought actual damages for her personal injuries and Paul sought actual damages for loss of consortium and lost services. Two months before trial the plaintiffs sought leave to amend their complaint to include a request for punitive damages. Plaintiffs' motion was denied as untimely.

Rodney was not a named party to the lawsuit. The Sprynczynatyks' insurance carrier had paid them $25,000, the policy limits, and the Sprynczynatyks had executed a release in favor of the named insured, Paul, his "heirs" and "all others," which arguably ran to Rodney.

Prior to trial Rodney was hypnotized by a trained psychologist, Dr. Robert Gordon, at the request of the plaintiffs' counsel. The hypnotic session was videotaped. While hypnotized Rodney recalled applying his right foot to the brakes as hard as he could before the car spun and left the gravel road. Prior to the hypnosis session, Rodney's recollection was different. On July 28, 1980, he gave a statement to an insurance agent that he didn't apply the brakes at all, and during his September 16, 1982 deposition he testified that he could have used the brakes but his best recollection was that he did not apply them.

During the hypnotic session, after Dr. Gordon put Rodney in a trance, he told Rodney his mind could reach back and recollect things that he never thought were

possible. Dr. Gordon then led Rodney back to the events of the day of the accident. Rodney recounted his actions throughout the day and then what happened during the accident. The two critical passages relating to his application of the brakes are as follows:

RODNEY: I get back into the right tracks and start going down and the car went over to the left.

GORDON: It's going to the left?

RODNEY: Um-hum. And I see that I'm gonna go in the ditch and hit the fence.

GORDON: You see you're gonna hit it. What are you going to do? Where is your right foot?

RODNEY: On the brake.

GORDON: Where's your left foot?

RODNEY: Over the clutch.

GORDON: What are you doing with your right foot and how much pressure are you putting on the brake?

RODNEY: Pushing.

GORDON: How hard?

RODNEY: Hard.

GORDON: As hard as you can?

RODNEY: Um-hum.

GORDON: Are you pumping it or pushing it?

RODNEY: No. I'm holding it steady.

GORDON: Holding it steady. What's happening now?

RODNEY: Car is sliding.

GORDON: What are you going to do?

RODNEY: Screaming, the car turns around.

GORDON: Where's your foot?

RODNEY: Still on the brake.

* * *

GORDON: What happens now?

RODNEY: The car spins all the way around. I'm looking the other way.

GORDON: Where's your left foot?

RODNEY: Over the clutch now.

GORDON: Where's your right foot?

RODNEY: On the brake.

GORDON: What happens now?

RODNEY: I look over and I see the ditch coming closer to me. I keep screaming. I take my hands off the wheel and I feel the car tipping and I put them on the ceiling and shut my eyes.

GORDON: When do you shut your eyes?

RODNEY: Right when the car is tipping over. I feel it tipping. I put my hands on the ceiling and I close my eyes.

GORDON: Where are your feet?

RODNEY: On the floor.

After undergoing hypnosis, Rodney testified at his November 14, 1983 deposition that he recalled applying the brakes hard just before the car started to spin.

GM filed a motion in limine to limit Rodney's trial testimony to his pre-hypnosis statements or to require plaintiffs to establish the reliability of Rodney's post-hypnosis testimony prior to allowing him to testify at trial. The plaintiffs opposed the motion and after oral argument the district court denied GM's motion in full.

The liability issues of the case were tried to the jury first. As part of plaintiffs' case-in-chief, following Vivian Sprynczynatyk's testimony, Dr. Gordon testified regarding Rodney's hypnosis session. During the direct examination of Dr. Gordon, plaintiffs offered the videotapes of Rodney's hypnosis session as evidence and sought to play the videotapes for the jury. GM objected on the grounds that the tapes were not admissible to prove the facts that were recited on the tapes. The court overruled the objection at which time GM orally requested that the court give a cautionary instruction that the matters that were related on the tapes were not to be taken as proof of the facts recited.[1] The court gave the following oral instruction:

> THE COURT: Ladies and gentlemen, the tapes that you are about to see are being received on the issue of—the ultimate issue of the credibility of the recall of the witness, Rodney Sprynczynatyk, and we aren't here—the purpose of them is to permit you to see it and you will be receiving other evidence on this subject both on the part of the plaintiff and contrary evidence from the defendant. And the purpose of viewing the tapes is to permit you to evaluate the opinions that you will subsequently hear.

The videotapes of the entire 56 minute hypnosis session were then viewed by the jury.

Rodney testified after Dr. Gordon without objection from GM. On direct examination Rodney testified that when the car was going toward the left ditch he started applying pressure to the brakes, the car kept going and

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1. During the instruction conference GM requested a written cautionary instruction to the same effect, which was also denied by the court.

then he hit them all the way and the car spun. On cross-examination Rodney testified that he now remembered things differently about the application of the brakes during the course of the accident than he did before hypnosis.

As part of its defense GM presented the expert witness, Dr. Martin Orne, a leading specialist in the field of hypnosis. Dr. Orne testified in general to the unreliability of hypnosis as a memory refresher and in particular to the absence of certain procedural safeguards in Rodney's hypnosis. Dr. Orne viewed Dr. Gordon's repeated questions regarding the location of Rodney's feet in relation to the brakes as a fatal flaw that was too suggestive and opined that Rodney's "new memory" was a creation of hypnosis and unlikely to be true.

The jury returned a verdict in favor of the Spryczynatyks on both the strict liability and negligence counts. Following a trial on the damages, the jury awarded Vivian $4,500,000 and her husband Paul $525,000. The trial court entered judgment in accordance with the verdicts and denied GM's post-trial motions.

GM then filed this appeal. For reversal GM argues that the trial court erred 1) in admitting the videotapes of Rodney's hypnosis session; 2) in admitting Rodney's hypnotically enhanced testimony; 3) in excluding certain evidence of GM's post-crash tests of the accident car; 4) in failing to instruct on comparative fault; and 5) that there was not substantial evidence to support the verdict.

The Sprynczynatyks cross-appeal, arguing that the trial court abused its discretion when it denied them leave to amend their complaint to include a claim for punitive damages two months before trial. We discuss each of these issues in turn.

DISCUSSION

I. Admission of the Videotapes

The first issue we address is GM's contention that it was prejudicial and reversible error for the trial court to admit the videotapes of Rodney's hypnosis session, and to permit the jury to view them during plaintiffs' case-in-chief without a specific instruction warning against their prohibited use to prove the truth of the matters asserted on the tapes. Plaintiffs contend the district court did not abuse its discretion in admitting the videotapes because they were admitted as a demonstrative aid to help the jury understand the expert testimony about the hypnotic process. We disagree.

In general a videotape offered to prove the truth of the matter asserted constitutes inadmissible hearsay. FED.R.EVID. 801(c). *United States v. Dorrell,* 758 F.2d 427, 434 (9th Cir.1985). In particular, courts have held that the contents of actual hypnotic interviews are inadmissible for the purpose of proving that the facts recounted by the hypnotized witness actually occurred. *State v. Brown,* 337 N.W.2d 138, 153 (N.D.1983) (en banc); *State v. Beachum,* 643 P.2d 246, 254 (N.M.App.1981). Thus a videotape is inadmissible as evidence unless it comes within an exception to the hearsay rule, *see, e.g., Grimes v. Employers Mutual Liability Insurance Co.,* 73 F.R.D. 607, 611 (D. Alaska 1977), or unless it is offered for some other permissible purpose which would remove it from the definition of hearsay.

When evidence can be admitted for one purpose but cannot be admitted for some other purpose, it has limited admissibility and is governed by Rule 105 of the Federal Rules of Evidence. Rule 105 provides in relevant part that:

> When evidence which is admissible * * * for one purpose but not admissible * * * for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 105 makes it the duty of the judge to restrict the evidence to its proper scope and entitles the opponent to a binding instruction that alerts the jury to the possibility of the forbidden use and tells them not to use it for that purpose. Since the videotapes of Rodney's hypnosis session are inadmissible to prove the truth of the matters asserted, but arguably admissible for the purpose of explaining the hypnotic procedure to the jury, the question is whether the court's limiting instruction was sufficient.

In this case GM requested in the presence of the jury a specific instruction stating the prohibited use, namely, that the videotapes were not offered to prove the truth of the facts recounted. Instead of adopting GM's proffered instruction, the district court told the jury that the tapes were being received on the ultimate issue of the credibility of Rodney's recall and that the purpose was to permit the jury to evaluate the opinions they would hear. Having viewed the videotapes and having reviewed the record in this case, we are convinced that the instruction given before the videotapes were shown was erroneous and insufficient under Rule 105 to prevent the prejudicial use of this evidence for the following reasons.

First, the court's oral instruction told the jury that the videotapes were being received on "the ultimate issue of the credibility of the recall of the witnss, Rodney * * *." This was clear error in the sense that the jury was directed to consider the videotapes for the purpose of assessing Rodney's credibility. Here the videotapes were admitted as

probative of the truth of what Rodney said on those tapes and that was error. Second, in the latter part of the instruction the court stated the permissible use of the tapes, namely for explanatory purposes, but failed to warn of the prohibited use. The instruction did not "restrict the scope" of the evidence. In fact, that part of the court's instruction gave a negative signal to the jury when considered in light of GM's specific request that the videotapes not be considered as truth of the matters asserted. By rejecting the prohibited use language as just articulated by GM's counsel, and utilizing only permissible use language, the jury was improperly led to think GM's proffered instruction was incorrect. Although we do not hold that Rule 105 requires all limiting instructions to contain the prohibited use language, we do state that in this case it was necessary in light of GM's specifically worded proposed request that was made in the presence of the jury. The inference that GM's requested instruction was wrong, when coupled with the erroneous issue-directing statement at the beginning of the instruction, renders the district court's instruction legally inadequate.[2]

Further, we find that under the circumstances of this case the showing of the videotapes of Rodney's hypnosis session without a proper cautionary instruction and during plaintiffs' case-in-chief was highly prejudicial to GM and not harmless. The issue of whether Rodney ever applied the brakes was central to the lawsuit and hotly con-

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2. If the district court determines on retrial that the videotapes are admissible (see p. 1123 *infra*), a legally adequate instruction would be: The videotapes you are about to view are admitted for a limited purpose and you may not consider them for any other purpose. The videotapes are admitted for the sole purpose of aiding you in your understanding of the hypnotic process. You are specifically cautioned to avoid considering the videotapes as evidence of the truth of the matters recounted on them.

tested. It was on the videotapes that the jury saw and heard Rodney, *for the first time,* state that he applied the brakes during the accident. The jury could not reasonably be expected to disregard the provocative nature of this inadmissible evidence and only consider what they saw as an aid to understanding the process of hypnosis. Other relevant evidence was available to accomplish this didactic purpose. In addition the jury could not reasonably be expected to overlook the fact that the videotapes were shown during plaintiffs' case-in-chief before GM ever challenged Rodney's hypnosis session and hypnotic recall. Because of the insufficient limiting instruction, the highly prejudicial nature, and premature presentation of the evidence, we conclude the district court abused its discretion in admitting the videotapes and that GM is entitled to a new trial.

Since this case must be retried, we turn to the other issues which are likely to arise anew, and upon which we feel compelled to comment.

II. Admission of Hypnotically Enhanced Testimony

The second hypnosis-related issue presented in this case is whether the trial court erred, as GM contends, in admitting Rodney's testimony at trial relating his post-hypnosis recollection that he applied the brakes during the accident.

As a preliminary matter the court must determine whether GM has preserved this point for appellate review. The plaintiffs contend that GM's failure to object during Rodney's direct examination precludes this court's review because FED.R.EVID. 103(a)(1) requires a timely objection be made in order to preserve an issue for appeal. GM responds that the district court's denial of its mo-

tion in limine was sufficient to preserve the issues raised in the motion.

Ordinarily in this circuit a motion in limine does not preserve error for appellate review. *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1333 (8th Cir.1985). However, we find that requiring a formal objection when Rodney took the witness stand at trial was not necessary under the circumstances of this case for two reasons.

First, we adhere to the Third Circuit's approach that Rule 103(a)(1) should be read in tandem with Federal Rule of Civil Procedure 46 which states that formal exceptions are unnecessary and that the test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the court's attention to a matter it need consider. *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir.1985). In the instant case the district court made a definitive pre-trial ruling that affected the entire course of the trial. The district court's denial of the motion was not made conditionally or with the suggestion that the matter would be reconsidered. It was not a typical motion in limine situation where a hypothetical question is posed whose nature and relevance is unclear before trial. The matter was fully briefed and argued. Under these circumstances requiring an objection when Rodney testified on the grounds raised in the motion in limine would have been in the nature of a formal exception and thus unnecessary under FED.R.CIV.P. 46. Second, we note that when the district court denied the motion in limine it implicitly denied GM's alternative request that the plaintiffs be required to establish before trial the reliability of Rodney's hypnotically enhanced testimony. There can be no question that the propriety of refusing to conduct such a preliminary hearing on the reliability

issue is squarely before this court and is not contingent upon the making of any objection during the trial.

We now turn to the merits of the issue of whether Rodney's hypnotically enhanced testimony is admissible. Stated in general terms, the issue is whether the testimony of a witness who has undergone hypnosis to refresh his or her recollection is admissible, and, if so, under what circumstances. This question, previously undecided in this circuit,[3] has been the subject of much discussion and disagreement.[4]

Before discussing the various legal approaches to this question it will be helpful to explain the phenomenon of hypnosis and to note the problems it creates in the legal context.

Hypnotism has been defined as "[t]he act of inducing artificially a state of sleep or trance in a subject * * * generally characterized by extreme responsiveness to suggestions from the hypnotist."[5] In a typical hypnotic ses-

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3. *United States v. Harvey*, 756 F.2d 636, 644-45 (8th Cir. 1985).

4. *See, e.g.*, Ruffra, *Hypnotically Induced Testimony: Should It Be Admitted?* 19 Crim.L.Bull. 293 (1983); Note, *A Survey of Hypnotically Refreshed Testimony in Criminal Trials: Why Such Evidence Should be Admitted in Iowa*, 32 Drake L.Rev. 749 (1982-83); Comment, *Hypnosis: A Primer for Admissibility*, 5 Glendale L.Rev. 51 (1983) [hereinafter cited as Comment, *Hypnosis*]; Note *Hypnotically Induced Testimony: Credibility versus Admissibility*, 57 Indiana L.J. 349 (1982); Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 Va.L.Rev. 1203 (1981); and Note, *Safeguards Against Suggestiveness: A Means For Admissibilty of Hypno-Induced Testimony*, 38 Wash. & Lee L.Rev. 197 (1981).

5. BLACK'S LAW DICTIONARY 668 (rev. 5th ed. 1979). We acknowledge that there is no single generally accepted theory of hypnosis, nor a concensus about a single definition. *See* Council on Scientific Affairs, American Medical Association, "Scientific Status of Refreshing Recollection by the Use of Hypnosis" 253, The Journal of the American Medical Association 1918 (April 5, 1985) [hereinafter cited as *Council on Scientific Affairs*]. We use the definition for discussion purposes only.

sion the hypnotist leads the subject to focus his or her attention, suspend critical judgment, follow the suggestions of the hypnotist, concentrate on a past event and then recount the past event. Hypnosis has been recognized by the American Medical Association as a valid therapeutic technique since 1958.[6] However, more recently hypnosis has been utilized for law enforcement investigative purposes in an attempt to aid witnesses and victims to remember forgotten details regarding an event that is the subject of a criminal or civil suit. It is when these previously hypnotized victims or witnesses take the stand to testify at trial that hypnosis becomes a legal issue. For although its use is generally accepted as therapy, the reliability of hypnosis as a truth-exacting device is controversial.[7]

There are many problems inherent in the hypnosis process that affect the degree in which it can be, if ever, an accurate memory restorer. Hypnosis is characterized by hypersuggestibility and hypercompliance of the subject. *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266, 1269 (1982); *State v. Long*, 32 Wash. App. 732, 649 P.2d 845, 848 (1982) (Swanson, J., concurring). The hypnotist can consciously or unconsciously lead the subject. "[A] hypnotized subject is highly susceptible to suggestion, even that which is subtle and unintended." *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980). A second problem associated with hypnosis is that the hypnotized witness may be influenced by the need to "fill in the gaps" in their memory, that is, to confabulate.

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6. *Council of Scientific Affairs, supra,* note 4, at 1918. For example, psychologists and psychiatrists use it to alleviate stress and doctors and dentists use it to control pain. Comment, *Hypnosis, supra,* note 3, at 57-58.

7. See Comment, *Hypnosis, supra,* note 3, at 51-58.

> The hypnotic suggestion to relive a a past event, particularly when accompanied by questions about specific details, puts pressure on the subject to provide information for which few, if any, actual memories are available. This situation may jog the subject's memory and produce some increased recall, but it will also cause him to fill in details that are plausible but consist of memories or fantasies from other times. It is extremely difficult to know which aspects of hypnotically aided recall are historically accurate and which aspects have been confabulated * * *.

State v. Hurd, 86 N.J. 525, 432 A.2d 86, 92-93 (1981) (quoting Orne, *The Use and Misuse of Hypnosis in Court*, 27 Int'l J. Clinical & Experimental Hypnosis 311, 317-318 (1979)).

Another concern over the use of hypnosis is the impact that it has on the hypnotized person's memory. After hypnosis neither the hypnotist nor the subject can distinguish between actual memories and those psuedo-memories confabulated under hypnosis. After hypnosis the subject has one memory of the past event, the hypnotic memory, and that becomes hardened in the subject's mind. *State v. Mack*, *supra*, 292 N.W.2d at 769.

Thus the basic problem for the courts is that hypnosis does not insure the accuracy of the witness' recall. Quite often hypnotized persons produce more information following hypnosis, but it may be accurate or inaccurate and there is no scientific technique that can reliably discriminate between true or false details recounted during hypnosis.[8]

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8. *Council on Scientific Affairs, supra,* note 4, at 1920.

Largely because of the scientific uncertainty as to the reliability of hypnotic recall, courts have taken at least three different approaches to the issue of the admissibility of testimony enhanced by hypnosis. Some jurisdictions allow such testimony to go to the jury viewing hypnosis as affecting credibility, not admissibility.[9] Other courts exclude such testimony as inadmissible *per se*.[10] Another group of courts admit hypnotically induced testimony, but only if detailed procedural safeguards are followed.[11]

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9. *See United States v. Awkard*, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116 (1979); *United States v. Adams*, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978); *United States v. Waksal*, 539 F.Supp. 834 (S.D.Fla.1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir.1983); *United States v. Narciso*, 446 F.Supp. 252 (E.D.Mich.1977). The following states have taken the same approach: *Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974); *State v. Wren*, 425 So.2d 756 (La.1983); *State v. Greer*, 609 S.W.2d 423 (Mo.Ct.App.1980), *vacated on other grounds*, 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); *State v. Brown*, 337 N.W.2d 138 (N.D.1983); *State v. Glebock*, 616 S.W.2d 897 (Tenn. Cr.App.1981); and *Chapman v. State*, 638 P.2d 1280 (Wyo.1982).

10. *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 644 P.2d 1266 (1982) (en banc); *People v. Shirley*, 31 Cal.3d 18, 181 Cal.Rptr. 243, 641 P.2d 775, *cert. denied*, 459 U.S. 860, 103 S.Ct. 133(74 L.Ed.2d 114 (1982); *People v. Quintanar*, 659 P.2d 710 (Colo.App.1982); *Bundy v. State*, 471 So.2d 9 (Fla.1985); *Collins v. State*, 52 Md.App. 186, 447 A.2d 1272 (1982); *People v. Gonzales*, 415 Mich. 615, 329 N.W.2d 743 (1982); *State v. Mack*, 292 N.W.2d 764 (Minn.1980); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981); *People v. Hughes*, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 453 N.E.2d 484 (1983); *State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177 (1984); *Com. v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981). Some of these courts do permit the witness to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, or is substantially the same as before hypnosis. *See, e.g., State v. Seager*, 341 N.W.2d 420 (Iowa 1983).

11. *People v. Smrekar*, 68 Ill.App.3d 379, 24 Ill. Dec. 707, 385 N.E.2d 848 (1979); *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981); *State v. Long*,

(Continued on following page)

The courts that automatically permit hypnotically enhanced testimony view the testimony as the witness' present recollection of events, refreshed by hypnosis, and conclude that the witness is competent to testify. *State v. Brown, supra,* 337 N.W.2d at 151; *Chapman v. State,* 638 P.2d 1280, 1282-1284 (Wyo.1982). That the witness' memory may have been impaired by hypnosis or that suggestive material may have been used to refresh his or her recollection is considered to be a matter affecting credibility, not admissibility. *Id.* It is expected that cross-examination, expert testimony on the inherent risks of hypnosis and cautionary instructions to the jury will enable the jury to accurately assess the proper weight to be given to the evidence. *Id.*

The second approach to determining admissibility adopted by some jurisdictions is to apply the test of general acceptance by the scientific community first enunciated in *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). In *Frye* the court stated that the evidence relating to a scientific principle or discovery is admissible when the principle is established sufficiently to have gained general acceptance in a particular field. *Id.* at 1014. Courts that have followed this approach have imposed a *per se* rule of inadmissibility to post-hypnotic testimony after finding that the process of hypnosis is not generally accepted as reliable by the scientific community. *See, e.g., People v. Shirley,* 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775, *cert. denied,* 459 U.S. 860, 103 S.Ct. 133,

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Footnote continued—

32 Wash.App. 732, 649 P.2d 845 (1982); *State v. Armstrong,* 110 Wis.2d 555, 329 N.W.2d 386, *cert. denied,* 461 U.S. 946, 103 S.Ct. 2125, 77 L.Ed.2d 1304 (1983). Oregon has adopted similar procedural requirements by statute. OR.REV.STAT. § 136.675 (1981).

74 L.Ed.2d 114 (1982); *People v. Gonzales,* 415 Mich. 615, 329 N.W.2d 743 (1982); and *State v. Mack, supra,* 292 N.W.2d at 768. In general these courts reviewed the scientific research on hypnosis, focused on the problems inherent in it as an accurate memory restorer and concluded that hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced will be sufficiently reliable to outweigh the risk of abuse or prejudice. *People v. Gonzales, supra,* 329 N.W.2d at 748.

As an example, in *State v. Mack, supra,* the court held that the results of hypnosis used to produce hypnotically induced "memory," like the results of mechanical or scientific testing, are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate. *Id.* at 768.

The third line of authority allows for the admissibility of hypnotically induced testimony if certain safeguards are followed to insure the reliability of the testimony. The leading proponent of this "procedural safeguard" approach has been the Supreme Court of New Jersey as articulated in *State v. Hurd, supra.* In *Hurd* the court held hypnotically induced testimony was admissible if the proponent of the testimony could demonstrate that the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall in its accuracy. The New Jersey court also held that in reviewing admissibility of hypnotically refreshed testimony, the trial court should evaluate the kind of memory loss that hypnosis was used to restore and the specific technique employed, based on the expert testimony presented by the parties. The court also laid down specific

requirements[12] which must be met before a party may introduce hypnotically refreshed testimony in a criminal trial. Therefore under the "procedural safeguard" approach the testimony may or may not be admissible depending upon the trial court's determination whether such testimony is reliable under the particular circumstances.

The Fifth Circuit has recently followed an approach similar in effect to the *Hurd* approach. In *United States v. Valdez*, 722 F.2d 1196 (5th Cir.1984) the court held that post-hypnosis testimony may or may not be admissible under FED.R.EVID. 403.[13] Although the *Valdez* court held in that particular case that post-hypnosis testimony in which a hypnotized witness identifies for the first time a person he knew was already under suspicion is inadmissible in a criminal trial, the court stated that if adequate procedural safeguards have been followed, corroborated post-hypnotic testimony might be admissible if the probative value of the testimony outweighed its prejudicial effect. *Id.* at 1203.

In the instant case the district court permitted Rodney to testify as to his post-hypnotic memory because North Dakota is one of the jurisdictions which has held that

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12. Those requirements are: (1) the hypnotist must be a qualified psychiatrist or psychologist who has experience in the use of hypnosis; (2) the hypnotist should be working independently of either side involved in the litigation; (3) all the information given to the hypnotist prior to the hypnosis session must be recorded; (4) the subject must describe the facts to the hypnotist as he remembers them before hypnosis; (5) all contact between the hypnotist and the witness must be recorded, preferably on videotape; and (6) no person besides the hypnotist and the subject should be present during any contact between the two. *State v. Hurd, supra,* 432 A.2d at 89-90. These safeguards were first proposed by Dr. Martin Orne, GM's expert.

13. A similar approach was adopted by the Court of Appeals of Alaska. *State v. Contreras,* 674 P.2d 792 (Alaska App. 1983).

hypnosis affects credibility but not admissibility. *See State v. Brown, supra,* 337 N.W.2d at 151. Federal courts are not bound by state law on this issue. Questions such as burden of proof, presumptions, competency, and privileges are generally questions of state law, but issues of admissibility of evidence are questions of federal law. *Warner v. Transamerica Insurance Co.,* 739 F.2d 1347, 1351 n. 6 (8th Cir.1984); *Sturm v. Clark Equipment Co.,* 547 F.Supp. 144, 145 (W.D.Mo.1982), *aff'd,* 732 F.2d 161 (8th Cir.1984). Quite simply, we do not view this issue as a competency question but as an evidentiary problem within the control of the district court and governed by federal law. *See United States v. Valdez, supra,* 722 F.2d at 1201.

GM urges this court to follow the *Frye* approach and in essence establish a *per se* inadmissibility rule or to adopt the "procedural safeguard" approach. Plaintiffs, on the other hand, advocate the credibility approach which is, for all practical purposes, a *per se* rule of admissibility of such evidence. We are reluctant to establish a *per se* rule of inadmissibility or admissibility and we decline to do so.

A *per se* rule would remove the question from the discretionary realm of the district court. If we were to establish a *per se* rule of inadmissibility, relevant, reliable testimony would in some instances be automatically disallowed and would hamper the truthfinding function of our system. A rule of *per se* inadmissibility is impermissibly broad and may result in the exclusion of valuable and accurate evidence in some cases. *See State v. Hurd, supra,* 432 A.2d at 94; *State v. Beachum, supra,* 643 P.2d at 252. On the other hand, if we adopt a *per se* rule of admissibility, in some circumstances, evidence that was unreliable because of the methods used in hypnosis and prejudicial because the jury may be overly influenced by testimony obtained from hypnotic recall would be admitted

and that too would have an undesirable effect on our judicial system. *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571, 577 (1984). A *per se* rule of admissibility does not cure the risks of undue prejudice and jury confusion. Accordingly, we adopt a flexible rule on the admissibility of hypnotically enhanced testimony that enables the district court to determine the question on a case-by-case basis. We are satisfied that, if the hypnosis session is properly conducted in appropriate cases, the hypnotically enhanced testimony does not run afoul of the *Frye* test to the extent it is applicable.

We adopt a rule which requires the district court, in cases where hypnosis has been used, to conduct pretrial hearings on the procedures used during the hypnotic session in question and assess the effect of hypnosis upon the reliability of the testimony before making a decision on admissibility. The proponent of the hypnotically enhanced testimony bears the burden of proof during this proceeding. In addition, we adopt a version of the *Hurd* safeguards[14]

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14. (1) The hypnotic session should be conducted by an impartial licensed psychiatrist or psychologist trained in the use of hypnosis and thus aware of its possible effects on memory so as to aid in the prevention of improper suggestions and confabulation. Appointment of the psychiatrist or psychologist should first be approved by the trial court. (Since this would be impossible in this case the trial court should not give controlling weight to the failure to secure court approval in the retrial of this matter.) (2) Information given to the hypnotist by either party concerning the case should be noted, preferably in written form, so that the extent of information the subject received from the hypnotist may be determined. (3) Before hypnosis, the hypnotist should obtain a detailed description of the facts from the subject, avoiding adding new elements to the subject's description. (4) The session should be recorded so a permanent record is available to ensure against suggestive procedures. Videotape is a preferable method of recordation. (5) Preferably, only the hypnotist and subject should be present during any phrase of the hypnotic session, but other persons should be allowed to attend if their attendance can be shown to be essential and steps are taken to prevent their influencing the results of the session.

to the extent that the district court should consider whether and to what degree the safeguards were followed when making its determination that the hypnotically enhanced testimony is sufficiently reliable.[15] Other factors the district court should take into account are the appropriateness of using hypnosis for the kind of memory loss involved, and whether there is any evidence to corroborate the hypnotically enhanced testimony. The district court must then determine whether in view of all the circumstances, the proposed testimony is sufficiently reliable and whether its probative value outweighs its prejudicial effect, if any, to warrant admission. Ultimately the district court must decide whether the risk that the testimony reflects a distorted memory is so great that the probative value of the testimony is destroyed.

By our ruling today we place this hypnosis evidentiary problem directly within the control of the district court. We think the better approach is for the district court and not the jury to make the preliminary determination of admissibility as is the case with other evidentiary questions. *See* FED.R.EVID. 104(a). It is our hope that this case-by-case method of determining the admissibility of hypnotically enhanced testimony will guard against the problems of hypnosis, especially undue suggestiveness and confabulation, but also allow for the inclusion of reliable refreshed memory which hypnosis can at times under certain circumstances produce. In sum, we hold that the district court should, before trial, scrutinize the circumstances surrounding the hypnosis session, consider whether the safeguards we have approved were followed and de-

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15. In adopting this approach we do not hold that if the safeguards were followed the testimony is always admissible, nor do we interpret the rule to mean that if some of the safeguards were not followed the testimony is never admissible.

termine in light of all the circumstances if the proposed hypnotically enhanced testimony is sufficiently reliable and not overly prejudicial to be admitted.

Upon retrial of this case, the district court should determine before trial the admissibility of Rodney's hypnotically enhanced testimony using the approach set forth in our discussion. In the event the district court finds that as a result of the hypnotic session Rodney's testimony on the application of the brakes has been tainted, by suggestion or confabulation, and is unreliable, Rodney will not be permitted to testify as to that matter based upon his post-hypnosis recollection. However, where it is clear that other parts of his memory of the events of the accident were present before hypnosis, and remain uncontaminated by hypnosis, the court can determine that Rodney may testify as to those events. *See State v. Seager*, 341 N.W.2d 420 (Iowa 1983).

In the event that the trial court finds that Rodney's post-hypnosis testimony is reliable and that its probative value outweighs its prejudicial effect, Rodney will be permitted to testify to his present recollection without reference to the fact of hypnosis. Plaitniffs will not present evidence of his hypnosis in their direct case-in-chief. If GM wishes to impeach Rodney's testimony because he was hypnotized, it may cross-examine concerning the hypnosis and both parties may then bring in experts to testify to the problems and benefits of hypnosis as rebuttal to the other party's assertions. Then and only then would the videotapes of the actual hypnosis session be considered for possible admission, subject to the district court's Rule 403 balancing test and if deemed more probative than prejudicial, subject to a limiting instruction as discussed in Part I *supra*.

III. Exclusion of Videotapes, Photographs, and Summaries of Post-crash Tests

GM also argues that the district court abused its discretion when it excluded videotapes, pictures and summaries of the tests it performed on the accident car in 1983. The court permitted GM's witnesses Newsock and McCarthy to talk about the tests, but the court excluded videotapes, photographs and summaries because they would not have been particularly helpful, would have been cumulative, and possibly prejudicial.

The admissibility of evidence of experimental tests rests largely in the discretion of the trial judge and his decision will not be overturned absent a clear showing of an abuse of discretion. *Hale v. Firestone Tire & Rubber Co., supra,* 756 F.2d at 1333; *Randall v. Warnaco, Inc.,* 677 F.2d 1226, 1238 (8th Cir.1982). We have read the testimony of GM's experts who fully described the tests and results and find that the tapes, photographs and summaries would, indeed, have been cumulative. We find no abuse of discretion in the district court's decision to exclude this series of cumulative evidence under those circumstances. *See Borough v. Duluth, Missabe & Iron Range Railway Co.,* 762 F.2d 66, 70 (8th Cir.1985).

IV. Instructions on Comparative Fault

GM also contends that the district court committed reversible error when it failed to instruct on comparative fault on either the strict liability or negligence counts. Since this case was tried the Supreme Court of North Dakota has decided at least four cases which have some bearing on this issue. *See Mauch v. Manufacturers Sales & Service, Inc.,* 345 N.W.2d 338 (N.D.1984); *Day v. General Motors Corp.,* 345 N.W.2d 349 (N.D.1984); *Andersen v.*

Teamsters Local 116 Building Club, Inc., 347 N.W.2d 309 (N.D.1984); and *Kaufman v. Meditec, Inc.*, 353 N.W.2d 297 (N.D.1984). Because of these new cases and our decision to remand for a new trial on other grounds, we need not decide whether it was error for the district court to refuse to instruct on comparative fault. However, upon retrial, the district court is free to reconsider its previous decision in light of the above cases.

V. Sufficiency of the Evidence

As a final assignment of error GM asserts that there was not substantial evidence to support the verdict.[16] GM maintains that plaintiffs' theory of the accident is a collection of false premises at odds with the physical facts and that the accident could not have occurred the way plaintiffs contend whether or not Rodney applied the brakes. Thus for purposes of our discussion of this issue GM's attack on the verdict is two-fold. First, GM contends that without Rodney's testimony that he applied the brakes, there was insufficient evidence to support plaintiffs' theory that a rear brake design defect caused the accident. Second, GM argues that even with Rodney's testimony that he applied the brakes, there was insufficient evidence to support plaintiffs' theory that a rear brake design defect caused the accident.

In view of our decision to reverse on the videotape issue and to leave to the district court, upon retrial, the question of whether Rodney's hypnotically enhanced testimony is admissible, we need not determine the hypothetical question of whether the evidence, without Rodney's post-

16. We construe GM's argument to be that the district court erred in denying its motions for directed verdict and judgment notwithstanding the verdict or new trial.

hypnosis recollection, is sufficient to support the verdict. Consequently we do not address GM's argument that there is not substantial evidence to support the verdict without Rodney's hypnotically enhanced testimony. To do so would be premature and, perhaps, unnecessary speculation on our part.

As for our assessment of the evidence that was presented to the jury in this case we hold that there was substantial evidence from which the jury could infer that the accident occurred in the manner suggested by the plaintiffs. Plaintiffs' theory was that Rodney applied the brakes, that the rear brakes locked before the front brakes causing the car to spin 180° on the road and then roll off and flip into the ditch. The following evidence was before the jury: (1) Vivian's testimony that the car spun before it left the road; (2) Rodney's testimony; (3) accident reconstructionist Arndt's opinion based on the physical damage to the car that the car swapped ends before it left the road and that the spin occurred as a result of an application of the brakes which caused the rear wheels to lock up momentarily; and (4) expert witness Manos' opinion based on the position of tire marks that the rear wheels on the car locked up. Admittedly GM proffered evidence to the contrary, but in considering the sufficiency of this evidence we must assume all facts which the plaintiffs' evidence tends to prove and all reasonable inferences fairly deducible from the facts must be drawn in the plaintiffs' favor. *SCNO Barge Lines, Inc. v. Anderson Clayton & Co.*, 745 F.2d 1188, 1192 (8th Cir.1984); *see also Ozark Air Lines, Inc. v. Larimer*, 352 F.2d 9, 11 (8th Cir.1965). Given this standard of review we cannot say that the evidence supporting the jury's verdict for the plaintiffs was not substantial.

VI. Punitive Damages Claim

Plaintiffs' only issue on cross-appeal is their contention that the trial court erred in refusing to allow an amendment to the complaint to include a claim against GM for punitive damages. The disposition of a motion to amend is within the sound discretion of the district court and to warrant reversal there must be some abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). In this case the district court denied the motion mainly because it was untimely in the sense, we assume, that it would have been disruptive to the trial schedule and potentially prejudicial to GM. We find no abuse of discretion in that ruling. However on retrial the district court's rationale for refusing the amendment is no longer as strong a consideration. So, while we see no abuse of discretion in the previous ruling, we direct the district court to reconsider the amendment on retrial. "An amendment can be proper after remand to the district court even if the claim * * * had not been presented to the district court in a timely fashion." *City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir.), *cert. denied*, ... U.S. ....., 104 S.Ct. 238, 78 L.Ed.2d 229 (1983) (citations omitted).

CONCLUSION

We conclude that the admission of the videotapes of Rodney's hypnosis session during plaintiffs' case-in-chief without a proper cautionary instruction constituted prejudicial error. Accordingly we reverse and remand for a new trial at which time the district court is directed to conduct pretrial proceedings consistent with this opinion to determine the admissibility of Rodney's hypnotically enhanced testimony and to consider plaintiffs' request to amend their complaint to include a claim for punitive damages.

APPENDIX B

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
North Dakota - Southwestern Division

Docket Number A1-82-88

Honorable John B. Jones, Judge

VIVIAN SPRYNCZYNATYK and PAUL SPRYNCZYNATYK,

v.

GENERAL MOTORS CORPORATION.

The jury having heretofore found liability against the above named defendant

IT IS ORDERED AND ADJUDGED that the plaintiffs have judgment against the defendant, General Motors Corporation, for damages as follows:

Vivian Sprynczynatyk — $4,500,000.00
Paul Sprynczynatyk — $ 525,000.00

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiffs have judgment against the defendant for costs and disbursements in the sum of $..... to be hereafter taxed by the Court.

Date December 9, 1983

APPENDIX C

(Filed April 2, 1984)

IN THE UNITED STATES DISTRICT COURT
For the District of North Dakota
Southwestern Division

CIV A1-82-88

PAUL SPRYNCZYNATYK and
VIVIAN SPRYNCZYNATYK,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
Defendant.

MEMORANDUM OPINION

Since entry of judgment herein, the parties have made the following motions: Motion to Review Taxation of Costs, by plaintiff; Motion for Judgment Notwithstanding the Verdict, or Alternatively, for New Trial, by defendant; Amended Motion to Vacate Protective Order, by plaintiff; and Motion to Substitute Trial Exhibits, by plaintiff. The first three were the subject of a conference call on December 28, 1983, in which a briefing schedule was set on the motions. I have now received the briefs of the parties.

1. Motion to Review Taxation of Costs

The Clerk disallowed the following items:

ITEM	COST
1. Preparation of videotape "Day in the Life"	$ 5,600.00
2. Video equipment rental for presentation of "Day in the Life"	$ 524.00
3. Attorney travel expense to attend depositions	$ 3,062.19
4. Cost of experts (Clerk allowed $1,532.85 for all Plaintiffs' experts' fees)	$30,450.22

I conclude that the Clerk acted properly in doing so.

All demonstrative evidence costs money, and would be viewed by the party presenting it as essential to their case. No authority has been cited for the proposition that such costs are taxable, and I found none.

In some instances, the costs of attorney travel expenses to attend depositions are taxable. It is clear that the costs of discovery in this case were increased by the intransigence of counsel, but it is my impression and belief that such intransigence existed equally on both sides of the case. In such case, there is no basis for taxation of costs based thereon.

Paschall v. Kansas City Star Co., 695 F.2d 322 (8th Cir. 1982) is cited by plaintiff in support of her request for expert witness fees *Paschall* does materially expand the law in this circuit in regard to taxation of expert witness fees. However, I am unwilling to find the testimony of the experts to be crucial or indispensible in this

case. For the most part, they were offered to support the testimony of other witnesses, rather than offering testimony that was available from no other source. In addition, the jury in this case was exceedingly generous in awarding plaintiffs over five five million dollars, and it doesn't appear to me to be inequitable or unjust to require plaintiff to assume her own expert witness costs.

2. Motion for Judgment NOV or for New Trial.

While the defendant presents a number of reasons why it contends the jury verdict should be set aside, I conclude that the only reasons which merit discussion are (A) whether error was committed in permitting Rodney Sprynczynatyk to testify after he had been hypnotized, (B) whether error was committed by admitting into evidence as part of plaintiff's case in chief the videotape of Rodney Sprynczynatyk's hyponsis session; (C) whether *Day v. General Motors Corporation,* ..... N.W.2d ..... (N.D. # Civil 10,519) requires reversal; and (D) whether the damages are excessive.

With regard to all other claims of error, I am satisfied that no error was committed for the reasons which I gave in ruling on these issues during the trial.

A. Testimony of Rodney Sprynczynatyk

There are sharp divisions of opinion in the various jurisdictions in this country as to the admissibility of hypnotically induced testimony. Scientific views differ on the reliability of hypnotically induced recall. I am willing to rest my admission of Rodney Sprynczynatyk's testimony at trial on *State v. Brown,* 337 N.W.2d 138 (N.D. 1983), which held, at page 151, that hypnosis affects credibility but no[t] admissibility. The credibility issue must be decided by the jury.

B. Admission of hypnotic session videotape

With the benefit of hindsight and additional reflection, I conclude that the videotape of the hypnotic session should not have been allowed during plaintiff's case in chief. Such a tape should be admitted, if at all, only after the credibility of the hypnotically enhanced recall testimony is placed in issue. The jury is then better able to follow the admonition that the tape is presented only on the issue of credibility and shouldn't be considered in deciding whether the recalled facts were true.

I also believe that the admonition I gave the jury prior to playing the videotape was a little weak in view of the rather dramatic showing of a hypnotized subject being questioned.

Plaintiff argues that even if error occurred in these regards, it is harmless since Rodney Sprynczynatyk's testimony was cumulative. I disagree with this position, since it was crucial to plaintiff's theory that the brakes had to have been applied. Prior to hypnosis, Rodney testified in substance that he didn't remember if he applied the brakes, but didn't think then he had. Had Rodney not been permitted to offer his hypnotically induced recall, the verdict on liability might well have been different.

Having said the foregoing, it is a close question as to whether a new trial should be ordered. Since I am not totally convinced that reversible error was committed by these rulings, and since I believe that close questions should be resolved in favor of the jury's verdict, I will deny the motion for a new trial.

C. Effect of *Day v. General Motors*

It is my belief that N.D.C.C. § 39-06-09 does not require that the negligence, if any, of Rodney Sprynczynatyk

be imputed to the plaintiff. This code section has no application to this case because no one is asserting any liability against Rodney in this case.

The general law of North Dakota also does not require that the negligence of the driver, Rodney, be imputed to the plaintiff passenger. Since there is no fault or negligence of the plaintiff in this case, as a matter of law, there is no basis for applying the rules of law announced in *Day v. General Motors Corporation, supra.*

D. Excessive Damages

The injuries sustained by the plaintiff in this case are horrendous. Plaintiff Vivian Sprynczynatyk is a quadriplegic with no reasonable prospect of ever getting any better, and with a high risk that she will in fact get worse. On the other hand, five million dollars is a lot of money. On the whole, I am not convinced the damages are excessive.

For the foregoing reasons, the defendant's Motion for Judgment Notwithstanding the Verdict, or, Alternatively, for New Trial will be denied.

3. Protective Order

The parties entered into a stipulation for a protective order, and the Court's order of November 14, 1983 (NR 121) was entered. Many documents were stamped as produced pursuant to the protective order, and the depositions of defendant's experts and employees were taken pursuant to the order.

The order excluded from its terms documents appearing in the public viewing file of the National Highway Traffic Safety Administration, documents unsealed by Judge Jackson in Civil No. 83-2220, and documents obtained from other sources. If defendant stamped any

documents thus excluded, the Court's order will take precedence over the stamp on the document.

It is possible that much of the material covered by the Protective Order as it presently exists would not be protectible under Rule 26(c)(7). If that is the case, I would be willing to vacate the protective order as to that specific material. I am not willing to enter a blanket order totally vacating the protective order.

I appreciate the fact that counsel does not relish the prospect of coming to Sioux Falls and going over all of the material now protected page by page to see if it should be protected under Rule 26(c)(7). I don't relish such a prospect either. But in fairness to both parties, there is no alternative to reviewing the material page by page.

The Amended Motion to Vacate Protective Order is denied.

4. Substitution of Trial Exhibits

Plaintiff previously requested temporary possession of the trial exhibits so they could be photographed or photocopied. The request was granted in our telephone conversation of December 28, 1983, and a written order was entered.

The plaintiff now seeks to withdraw all trial exhibits and substitute photographs of them. Since this case is being appealed, I believe the Clerk should retain the original exhibits until the appeal is resolved. The Motion to Substitute Trial Exhibits will be denied.

An order consistent herewith will be entered.

Dated this 29th day of March, 1984.

/s/ John B. Jones
United States District Judge

Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1045

In The

Supreme Court of the United States

October Term, 1985

VIVIAN SPRYNCZYNATYK and
PAUL SPRYNCZYNATYK,

Petitioners

vs.

GENERAL MOTORS CORPORATION,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

McCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcadero Center
San Francisco, California 94111

PEARCE, ANDERSON & DURICK
314 East Thayer Avenue
Bismarck, North Dakota 58502

JOHN P. RALEIGH
General Motors Corporation
3044 West Grand Boulevard
Detroit, Michigan 48202

Of Counsel

David M. Heilbron
(Counsel of Record)
James B. Lewis
Joseph M. Stockwell
Three Embarcadero Center
San Francisco, California 94111
(415) 393-2000

Harry J. Pearce
Christine A. Hogan
314 East Thayer Avenue
Bismarck, North Dakota 58502
(701) 223-2890

Attorneys for Respondent General Motors Corporation

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COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

A fourteen year old boy drove a 1980 GM Chevrolet Citation off a steep gravel road in North Dakota. The boy's mother was very badly hurt. She and her husband sued GM on a product liability theory that called for the boy to have hit the brakes. But the boy said and swore three times after the accident that he had not used the brakes at all. So the boy was sent to Texas to be hypotized. The hypnotist disregarded safeguards he endorsed. He knew what counsel was interested in, led the boy to it, and the boy, full of hope, followed. Hypnotized, he said he had hit the brakes as hard as he could.

The District Court, sitting in diversity, purported to follow *State v. Brown*, 337 N.W.2d 138 (N.D. 1983), and admitted the boy's testimony without determining whether it was reliable or whether its probative value outweighed its prejudicial effect. The Court of Appeals reversed on other grounds, not challenged here, remanded, and directed the District Court on remand to make that determination. The question presented is this:

Is a federal court in a diversity action required to admit testimony changed by hypnosis even if it is unreliable or its prejudicial effect outweighs its worth, if any?

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GENERAL MOTORS CORPORATION,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent General Motors Corporation respectfully requests this Court to deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case reported at 771 F.2d 1112.

STATUTES INVOLVED

Federal Rule of Evidence 403:

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. The Accident

On July 16, 1980, petitioner Vivian Sprynczynatyk and her son Rodney, age 14, were driving on a gravel road in North Dakota. Rodney was at the wheel. He had just gotten his learner's permit a couple of weeks before, and Vivian was teaching him how to drive. (R.T. 116) They went up a hill and started down the other side. (R.T. 96-101, Exs. 1-2) The road, still gravel, was steep, about an 11% grade (R.T. 215, 691, Ex. 28), and rough, like a washboard. (R.T. 120)

Rodney let the car pick up speed. (R.T. 199-200) The car "jerked sharp" to the right. (R.T. 101, 227) Rodney steered it back to the left, but then it jerked right again. (R.T. 103-04, 211) Rodney steered to the left again, crossed the middle of the road and headed for the left ditch. He was into loose gravel. (R.T. 104, 202-03, 227) He steered back right, saw the right "ditch coming closer" (R.T. 205), and panicked. (R.T. 245-46) He took his hands off the wheel, and closed his eyes. (R.T. 206)

The car went into the right ditch and rolled over. Vivian Sprynczynatyk's neck was broken and she is a quadriplegic. (R.T. 109, 1413 et seq.)

The car was a 1980 Chevrolet Citation manufactured by respondent General Motors Corporation ("GM"). Vivian sued GM for her injuries in the United States District Court for the District of North Dakota, alleging negligence and strict liability. Her husband sued for loss of

consortium and lost services. Jurisdiction was based on diversity of citizenship. (C.R. 1-4)

B. Plaintiffs' Theory and the Difficulty With It

Nothing wrong with the car had caused it to jerk right those two times, and there was no explanation about why it had except the road and driver error. (R.T. 499-500, 636-37) Plaintiffs' lawyers' theory was that Rodney hit the brakes after he steered the car back right the third time, that the rear brakes locked, and that that made the car spin off the road. (R.T. 61-65)

The difficulty was that Rodney said and swore three times that he had not hit the brakes. Thus, twelve days after the accident, he gave a sworn statement about it. He said, "I didn't apply the brakes at all." (R.T. 230-31) Two years later Rodney swore at deposition, "I didn't use any brakes at all." (R.T. 222, 225-26)[1]

C. The Solution: Hypnosis in Texas

After the deposition, without notice to the court or GM (C.R. 98), Rodney was sent to Texas to be hypnotized. The hypnotist was Dr. Robert Gordon, a psychologist with a law degree. Hypnosis played a "very limited" role in Dr. Gordon's practice (R.T. 130-34, 152-53), but he had worked on other things with plaintiffs' lawyers many times before. (R.T. 154)

1. *Guidelines for hypnotic refreshment of memory.*

GM's expert was Dr. Martin Orne, president of the International Society of Hypnosis, editor of the International Journal of Clinical and Experimental Hypnosis, and senior author of the Encyclopedia Britannica's article

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[1] Though Rodney speculated that "it could have been possible" that he used the brakes, his "best recollection" remained that he "did not apply them." (R.T. 245-46)

on hypnosis. (C.R. 110, Orne Aff., Exs. A, B, C) His eminence is repeatedly recognized in the case law. *See, e.g., People v. Shirley,* 31 Cal. 3d 18, 63, 181 Cal. Rptr. 243, 270, 641 P.2d 775, 802, *cert. denied,* 459 U.S. 860 (1982).

Dr. Orne has proposed guidelines for the use of hypnosis to enhance memory if hypnotically enhanced testimony is to be admitted at trial at all. (He does not believe it should.) The guidelines have been adopted by the Criminal Investigation Department, Army, Navy, Air Force, Marines, Treasury Department, and the British Home Office. (R.T. 937-39)

The guidelines call for these procedures, among others:

1. The hypnotist "should get a written statement of the facts" he is told about the case before hypnosis, so there is no doubt what he knows about it; a hypnotist who knows what is at issue is apt, by "subtle cuing," unwittingly to suggest responses to the subject in hypnosis. (R.T. 931-32 (Orne))

2. The hypnotist should tape record the pre-hypnosis interview, so there is no doubt what was said during it: for if the hypnotist suggests a response, the subject will "respond that way" in hypnosis. (R.T. 933-34 (Orne); 169 (Gordon))

3. The hypnotist should determine what the subject knows about the case at the pre-hypnosis interview; that is "crucial" (R.T. 934 (Orne)), since hypnosis may not be "indicated" or "safe" except where one has "difficulty in recollection" (R.T. 155 (Gordon)), and is in fact counterproductive if one does recall. (R.T. 914, 919-20, 943 (Orne))

4. The hypnotist should conduct a post-hypnosis interview, and tape-record it; the post-hypnosis interview is necessary to "know what really went on in hypnosis." (R.T. 934 (Orne))

Dr. Gordon "strongly endorsed" the guidelines (R.T. 985), but he did not follow them and did none of those things. (R.T. 135-36, 142-43, 169-76, 179, 238) Therefore we do not know exactly what happened pre- and post-hypnosis, except this: Plaintiffs' attorneys told Dr. Gordon before hypnosis that (a) Rodney had "lost his memory of the accident" or had "little or no memory of it" (not so) (R.T. 135-36, 171 (Gordon)); and (b) "there was a problem with the brakes" (plaintiffs' liability theory). (R.T. 171-72)[2]

The hypnosis session was videotaped (with one gap), so there is a record of what went on there.

2. *The hypnosis session*

Dr. Gordon put a ring on a coffee table, told Rodney to focus on it and be filled by it, and put him into a trance. He told Rodney "the mind can reach back and recollect things that you never thought were possible." He said "we only have to reach back and recall it . . . . I'm going to let you show me how well you can do that now." (Exs. 4-7, the videotape) Plaintiffs' lawyer was watching through a one-way mirror, and Rodney knew that. (R.T. 234)

Dr. Gordon took Rodney through the day and evening of the accident, and up the gravel hill and down it.

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[2] At trial Dr. Gordon could not recall whether they told him that before or during the hypnosis session (R.T. 172), but at deposition he was clear it was before (Gordon depo., Do. No. 182, pp. 134-35). Dr. Gordon was admittedly "not naive." He understood that the alleged brake problem "would go to the essential matter of liability." (*Ibid.*)

He praised Rodney, and told Rodney he and his family were proud of him as they went along. When they started down the hill, Dr. Gordon began asking Rodney where his feet were: Where is your left foot? Where is your right foot? Where are your feet? (Exs. 4-7) Thirty-two times he asked that, and his voice rose as he did. (R.T. 179 (Gordon); R.T. 954 (Orne); Exs. 4-7) But Rodney did not answer that he had hit the brakes until, finally, this happened:

"RODNEY: Uh-huh. And I see that I'm going to go in the [left] ditch and hit the fence . . . .

"DR. GORDON: You see you are going to hit it. *What are you going to do?* Where is your right foot?

"RODNEY: On the brake.

"DR. GORDON: Where is your left foot?

"RODNEY: Over the clutch.

"DR. GORDON: What are you doing with your right foot and *how much pressure are you putting on the brakes?*

"RODNEY: Pushing.

"DR. GORDON: How hard?

"RODNEY: Hard.

"DR. GORDON: *As hard as you can?*

"RODNEY: Uh-huh." ((R.T. 239-40) emphasis added)

Shortly afterward, Dr. Gordon left the room and conferred with plaintiffs' lawyer. He came back, asked a few questions, then said he was "very, very pleased." Then he brought Rodney out of the trance. He told Rodney he would be in a "beautiful place" when he came out of it, where "you love everybody and everybody loves you" and "you feel terrific."

Rodney and Dr. Gordon smiled and shook hands and the session ended. Rodney felt as if a burden had been lifted from his shoulders. (R.T. 236 (Rodney); C.R. 107)

3. *Dangers with hypnosis and problems with this hypnosis session*

Hypnosis as therapy is accepted and widely used; as Dr. Orne explained, it may serve its therapeutic goal regardless of whether what the patient "relives" is fact or fantasy. (R.T. 894-900) But hypnosis meant to refresh or reform one's memory so one can testify to it is something else. There it matters whether what the patient relives—and testifies to—is fact or fantasy. (R.T. 915-16 (Orne); 166 (Gordon))[3]

Dr. Orne explained that hypnosis as truth finder is unreliable, and in particular was unreliable here. Dr. Gordon essentially agreed with him. The dangers are these:

Suggestion. One under hypnosis suspends critical judgment, and wants very much to please the hypnotist. Consequently, he is in a "state very vulnerable to subtle suggestions." (R.T. 887-88, 906-07, 934 (Orne)) When made, they "contaminate" the patient's memory, because they change it. (R.T. 142, 157 (Gordon); 889-90 (Orne))

Dr. Gordon's advice to Rodney that "the mind can reach back and recollect things that you never thought were possible" was a "powerful, explicit" suggestion. Its effect was to encourage invention. (R.T. 911, 949 (Orne); 159-60, 179 (Gordon)) Dr. Gordon's 32 questions about Rodney's feet were also suggestions. Ac-

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[3] As Dr. Orne explained, hypnosis may be a useful investigative tool, "recognizing that each item is merely a lead and nothing else." A lead is not testimony. It can simply be followed, and may turn something up—or prove an "embarrassment." (R.T. 920-21 (Orne))

cording to Dr. Orne, they were the "fatal flaw," for they told Rodney what Dr. Gordon was interested in. (R.T. 953-55 (Orne)) In fact, Rodney did not say he applied the brakes at all until Dr. Gordon put a leading question that told Rodney exactly what Dr. Gordon was interested in: How much pressure did you put on the brakes? (Not, did you apply them?).

Dr. Gordon made his suggestions the more forceful by his intense tone of voice (R.T. 953-55 (Orne)) and made Rodney the more apt to accept them by praising him when he responded well (including seven times after Rodney talked about where his feet were). (R.T. 888 (Orne))

Dr. Orne testified Dr. Gordon's suggestions would "assure a change in memory." (R.T. 954)

Confabulation. One under hypnosis may "confabulate." Confabulation means making up details one does not recall but that seem to fit. One is particularly prone to confabulate in response to suggestions. (R.T. 162-65 (Gordon); 908-10 (Orne))

Neither hynotist nor patient can tell what is confabulation and what is real memory without checking what the patient says against objective data. (R.T. 158, 162-63, 175-76 (Gordon)) Rodney said only three things that could be checked that way. They show he confabulated. He said he watched "The Price Is Right" on TV on the accident day, but it was on before he got up; he said he watched "The Beverly Hillbillies" also, but it was not on at all that day; and he said his sister fed the dogs, but she was out of town. (R.T. 951-53 (Orne); R.T. 234-35, 241 (Rodney))

Hopes. Before hypnosis Rodney had heard about some brake problems in Chevrolet Citations, and "knew"

if the brakes were hit hard the car could spin. (R.T. 237 (Rodney)) He wanted to be hypnotized to find out whether the accident was his fault or the car's, and naturally he hoped very much it was the car's. (R.T. 943-46 (Orne))

Hypnosis plays on hopes and fantasies, and in hypnosis a strong hope "very likely" will become memory. (R.T. 943-46 (Orne))

Altered Memory. Plaintiffs' lawyers told Dr. Gordon that Rodney had no or little recollection of the accident. That was not so. Rodney had given a full statement and then a deposition about the accident before hypnosis, and it was "striking how fairly complete" his memory was. (R.T. 941 (Orne))

Neither subject nor hypnotist can tell whether what the subject says in hypnosis is fact or fantasy, even where he has no memory before hypnosis. (R.T. 144-45, 157-58, 162-63, 175-76 (Gordon); 904, 915-16, 946-48, 956 (Orne)) If one has a clear memory before hypnosis, the "likelihood" that a hypnotic memory replacing it will be more accurate "is so low that you can virtually discount it." (R.T. 956 (Orne))

Altered Witness. One believes that what he "relives" in hypnosis really happened, and with "great conviction." (R.T. 947 (Orne)) Believing he has found truth, he will likely be a most confident witness. (R.T. 176 (Gordon)) Indeed, "very few" researchers would say that "hypnosis does not destroy the ability to cross-examine." (R.T. 977 (Orne))

Rodney's hypnotic memory replaced his pre-hypnosis memory. He went on to testify to his "new memory," an altered witness. (R.T. 956 (Orne); 238 (Rodney))

D. Proceedings in the District Court

GM moved *in limine* to exclude testimony as to Rodney's hypnotically induced memory on the grounds, among others, that hypnosis is not generally accepted or reliable, and that this hypnosis did not meet procedural safeguards and was like tampering with physical evidence. (C.R. 97-100) The district court did not determine whether hypnosis is generally accepted or reliable, or whether this hypnosis complied with any procedural safeguards. It cited *State v. Brown*, 337 N.W. 2d 138 (N.D. 1983), ruled that Rodney's credibility was for the jury, not the court, and denied the motion. (11/28/83 Tr. pp. 94-99)

Plaintiffs called Dr. Gordon as part of their case-in-chief and offered the videotapes of Rodney's hypnosis session in connection with Dr. Gordon's testimony. GM objected to admission of the videotapes because they were hearsay and prejudicial. The court overruled the objection. (R.T. 145-47) GM asked for a cautionary instruction that the tapes not be taken as proof of the truth of the matters Rodney recounted in them. The court did not give the instruction, and instead told the jury "the purpose of viewing the tapes is to permit you to evaluate the opinions that you will subsequently hear." (R.T. 147; R.T. 1304-05; C.R. 194) The jury then watched the videotapes.

Plaintiffs' liability case was, at best, weak. After trial, the district court itself said that had "Rodney not been permitted to offer his hypnotically induced recall, the verdict on liability might well have been different." (App. A32; C.R. 274)

The jury awarded plaintiffs over $5,000,000 in damages. (C.R. 225)

E. The Court of Appeals' Ruling

The Eighth Circuit held that the videotapes of Rodney's hypnosis session were hearsay and that their admission during plaintiffs' case in chief without an adequate instruction was prejudicial error. It therefore reversed and remanded for a new trial. (App. A11; 771 F.2d at 1118) Plaintiffs do not challenge that ruling here.

The Eighth Circuit also went on to rule that the district court erred in admitting Rodney's hypnotically induced testimony without determining its reliability and whether its worth, if any, outweighed its prejudicial effect. The Court adopted a version of Dr. Orne's safeguards and directed the district court, in making that determination, to consider "to what degree the safeguards were followed" and to "take into account . . . the appropriateness of using hypnosis for the kind of memory loss involved, and whether there is any evidence to corroborate the hypnotically induced testimony." (App. A22; 771 F.2d at 1123) Its holding essentially restates the standard of Federal Rule of Evidence 403:

> "[W]e hold that the district court should, before trial, scrutinize the circumstances surrounding the hypnosis session, consider whether the safeguards we have approved were followed *and determine in light of all the circumstances if the proposed hypnotically enhanced testimony is sufficiently reliable and not overly prejudicial to be admitted.*" (App. A22-A23; 771 F.2d at 1123) (emphasis added).

The Eighth Circuit directed the district court to make that determination on remand.

The district court has not made that determination as to reliability because plaintiffs petitioned to bring the case here before it was remanded there. So plaintiffs ask

this Court to rule that hypnotically induced testimony is admissible whether or not it is reliable and whether or not its worth outweighs its prejudicial effect.

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REASONS FOR DENYING THE WRIT

I. THE CASE IS NOT RIPE FOR REVIEW

The Eighth Circuit found the admission of the videotapes of Rodney's hypnosis session during plaintiffs' case-in-chief was prejudicial error, and therefore remanded for retrial. (App. A27; 771 F.2d at 1125.) Plaintiffs do not argue with that ruling here. Instead, they seek review only of the Court of Appeals' additional ruling on the admissibility of Rodney's live testimony.

"[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 (1967). *See also Estelle v. Gamble*, 429 U.S. 97, 114-115 ((1976) (Stevens, J., dissenting); *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-58 (1916). Indeed, the issue plaintiffs put to this Court will be moot if on remand the district court excludes Rodney's hypnotically induced testimony but plaintiffs prevail, or if the district court admits the testimony but GM prevails. There is no need to decide moot issues, and it is an imposition on this Court to ask it to decide appeals piecemeal.[4]

II. THE DECISION BELOW WAS SOUNDLY BASED ON RELEVANT AUTHORITY

Plaintiffs claim that the Eighth Circuit's decision is wrong on the merits. They rely on old, and bad, law (Subpart A) and distinctions without a difference (Subpart B).

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[4] Even if the admissibility of testimony affected by hypnosis were certain to be an issue after retrial, it would be better decided after the district court has had an opportunity to make findings that bear on its reliability.

A. The Law

1. *The Old Law and the New Law*

In 1968 the Maryland Court of Special Appeals affirmed the admission into evidence of hypnotically induced testimony, the first court in the United States to do so. *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969). Several jurisdictions followed *Harding*,[5] including, in a fashion, the Ninth Circuit, the first and only federal circuit to follow it. *Kline v. Ford Motor Co.*, 523 F.2d 1067 (9th Cir. 1975); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 509 (9th Cir. 1974); *but see United States v. Awkard*, 597 F.2d 667, 669 n. 2 (9th Cir. 1979); *United States v. Adams*, 581 F. 2d 193, 198, 199 n. 12 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978).

Harding and descendants overlooked *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923) and the fifty (now sixty) years of precedent that followed it. *Frye* held that the result of a scientific technique (there a lie detector test) is inadmissible unless the technique has "gained general acceptance in the particular field in which it belongs." 293 Fed. at 1014. *State v. Mack*, 292 N.W. 2d 764, 767-68 (Minn. 1980) held the *Frye* "general acceptance" test applicable to hypnosis. Thereafter case after case followed *Mack*, and the "most recent decisions by other jurisdictions have consistently applied" *Frye*. *Collins v. State*, 52 Md. App. 186, 198, 447 A.2d 1272, 1279 (1982); *State v. Martin*, 101 Wash. 2d 713, 721, 684 P.2d 651, 655 (1984) (the "substantial majority" applies *Frye*); *Commonwealth v. Kater*, 388 Mass. 519, 526-27, 447 N.E.2d 1190, 1196 (1983) (same).

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[5] See cases collected in *People v. Shirley*, 31 Cal. 3d at 36-38, 181 Cal. Rptr. at 253-54, 641 P.2d at 785-86. *Shirley* relates the applicable history in detail.

Mack and its descendents exhaustively reviewed the scientific literature and experts' opinions — most prominently Drs. Orne's and Diamond's — respecting hypnosis. Upon that review, *Mack* and every case after it applying *Frye* found that hypnosis, even if properly conducted, fails *Frye's* test: Hypnosis is not "generally accepted" by the scientific community as a reliable means to restore, refresh, or find memory. To the contrary, the "overwhelming consensus of expert opinion" is that it is not reliable, and there is no "doubt" about that. *People v. Shirley*, 31 Cal. 3d at 23, 40, 66, 181 Cal. Rptr. at 244, 255-56, 272, 641 P.2d at 776, 787, 804. Consequently, every case following *Mack* and applying *Frye* holds hypnotically induced testimony inadmissible. *See State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 196, 644 P.2d 1266, 1282 (1982) (Arizona); *People v. Shirley*, 31 Cal. 3d 18, 66, 181 Cal. Rptr. 243, 273, 641 P.2d 775, 804, *cert. denied*, 459 U.S. 860 (1982) (California); *People v. Quintanar*, 659 P.2d 710, 711 (Colo. Ct. App. 1982) (Colorado); *Peterson v. State*, 448 N.E.2d 673 (Ind. 1983) (Indiana); *State v. Haislip*, 237 Kan. 461, 701 P.2d 909, *cert. denied*, — U.S. —, 106 S. Ct. 575 (1985) (Kansas); *Collins v. State*, 52 Md. App. 186, 205, 447 A.2d 1272, 1283 (1982) (Maryland); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983) (Massachusetts); *People v. Gonzalez*, 415 Mich. 615, 626, 329 N.W.2d 743, 748 (1982) (Michigan); *Alsbach v. Bader*, No. 66470 (Mo. Nov. 21, 1985) (available Feb. 1, 1986, on LEXIS, Missouri library, Civil file (Missouri)); *State v. Palmer*, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981) (Nebraska); *People v. Hughes*, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 265-66, 453 N.E.2d 484, 495 (1983) (New York); and *Commonwealth v. Nazarovitch*, 496 Pa. 97, 110, 436 A.2d 170, 177 (1981) (Pennsylvania).

As for *Harding* and descendents, that is "moribund precedent." For in 1982 the same Maryland court that decided *Harding* in the first place repudiated it, held that *Mack* and *Frye* govern instead, and so dealt the *Harding* line its "coup de grace." *See People v. Shirley*, 31 Cal. 3d at 48, 181 Cal. Rptr. at 261, 641 P.2d at 792; *Collins v. State*, 52 Md. App. at 195-96, 447 A.2d at 1278.

Hypnosis as memory restorer is not generally accepted for the same reasons Dr. Orne — and often Dr. Gordon — advised the district court it was not: (1) The hypnotic subject is "highly susceptible to suggestion," even "that which is subtle and unintended," and his "critical judgment" is impaired. (2) The subject "has a compelling desire to please the hypnotist by reacting positively to these suggestions . . . ." (3) Neither subject nor hypnotist nor anyone else can tell whether a memory generated during hypnosis is fact, fantasy, or "confabulation." (4) The subject becomes utterly "convinced of the absolute truth of the account he made while under hypnosis," and it is "impossible to cross-examine such a witness in a meaningful way." *E.g., People v. Shirley*, 31 Cal. 3d at 43-44, 65-66, 181 Cal. Rptr. at 258, 272, 641 P.2d at 789-90, 803-04; *Collins v. State*, 52 Md. App. at 199-201, 447 A.2d at 1280; *State v. Mack*, 292 N.W.2d at 768-69; pp. 7-9, above.

2. *The Valdez-Hurd-Eighth Circuit Rule*

Other courts have found the same shortcomings with hypnotically induced testimony that *Mack* did, but have not gone so far. They strike a middle ground between *Mack* and *Harding* and hold that the testimony might be admitted if, among other things, the hypnosis session follows the procedural safeguards proposed by Dr. Orne to the district court. *United States v. Valdez*, 722 F.2d 1196

(5th Cir. 1984) (applying Federal Rule 403); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981).

The Eighth Circuit essentially followed *Valdez* and *Hurd*.

B. Plaintiffs' Distinctions With No Difference

Plaintiffs attack the Eighth Circuit's decision by distinctions with no difference. First they say the Eighth Circuit's decision improperly relied on criminal cases. But whether the cases are civil or criminal is beside the point. The reason for the *Mack* and *Valdez-Hurd*[6] rules is that hypnotically induced testimony is unreliable, and "[u]nreliable evidence is unreliable evidence in any forum." *de Vries v. St. Paul Fire & Marine Insurance Co.*, 716 F.2d 939, 945 (1st Cir. 1983) (quoting *Memphis Bank and Trust Co. v. Tennessee Farmers Mutual Insurance Co.*, 619 S.W. 2d 395, 496 (Tenn. Ct. App. 1981)). *Lemieux v. Superior Court*, 132 Ariz. 214, 215, 644 P.2d 1300, 1301 (1982):

> "The concerns that this court expressed in determining that posthypnotic testimony is unreliable in criminal trials are equally applicable in civil litigation."

Second, plaintiffs claim that "[m]any of the cases cited in the [Eighth Circuit's] opinion base their holding on a specific constitutional requirement" and "a constitutional or procedural right peculiar to the criminal defendant." (Pet. 18) That is also wrong. The Eighth Circuit's opinion cites seventeen cases. Ten do not mention constitutional rights of a criminal defendant as a basis for their

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[6] Plaintiffs say "*Hurd* itself realized that different standards were appropriate in the civil area and specified what those standards should be." (Pet. 19) That is wrong. *Hurd* expressly refrained from deciding "whether all of the procedural requirements [it set forth] would be necessary" in a civil case, though expressing the belief that "[a]s a minimum . . . a recording of the session is essential." 432 A.2d at 97 n. 6.

holdings.[7] The other seven that do found the unreliability of hypnosis an independent basis for their holdings as a matter of evidence law.[8] Indeed, several apply their holdings to hypnotically induced testimony offered by the defense as well as by the prosecution,[9] and therefore obviously do not depend on a criminal defendant's constitutional rights.

Third, plaintiffs speculate that "[i]t is entirely possible, if not in fact likely, that most of the criminal cases upon which the opinion relies are applying the beyond a reasonable doubt standard of proof to the preliminary

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[7] *People v. Shirley*, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P.2d 775, *cert. denied*, 459 U.S. 860 (1982); *People v. Quintanar*, 659 P.2d 710 (Colo. Ct. App. 1982); *Bundy v. State*, 471 So. 2d 9 (Fla. 1985); *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984); *People v. Smrekar*, 68 Ill. App. 3d 379, 24 Ill. Dec. 707, 385 N.E.2d 848 (1979); *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272 (1982); *People v. Gonzalez*, 415 Mich. 615, 329 N.W.2d 743 (1982); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981).

[8] *United States v. Valdez*, 722 F.2d 1196, 1201 (5th Cir. 1984); *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 183, 644 P.2d 1266, 1269 (1982); *State v. Hurd*, 86 N.J. 525, 546-47, 432 A.2d 86, 97 (1981); *State v. Beachum*, 97 N.M. 682, 691, 643 P.2d 246, 255 (1981); *People v. Hughes*, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 264-65, 453 N.E.2d 484, 494 (1983); *State v. Peoples*, 311 N.C. 515, 531-32, 319 S.E.2d 177, 187 (1984); *State v. Armstrong*, 110 Wis. 2d 555, 574-76, 329 N.W.2d 386, 396, *cert. denied*, 461 U.S. 946 (1983). Four of these cases (*Valdez, Hughes, Beachum, and Armstrong*) relied only on due process as the alternative ground. Civil defendants are, of course, also entitled to due process.

[9] *People v. Shirley*, 31 Cal. 3d 18, 67, 181 Cal. Rptr. 243, 273, 641 P.2d 775, 805, *cert. denied*, 459 U.S. 860 (1982) (excepting criminal defendant from general prohibition because of right to testify in his own behalf); *Collins v. State*, 52 Md. App. 186, 202-03, 447 A.2d 1272, 1281-82 (1981); *State v. Mack*, 292 N.W.2d 764, 771 (Minn. 1980); *State v. Beachum*, 97 N.M. 682, 690, 643 P.2d 246, 254 (1981). Other cases not referred to in the Eighth Circuit's opinion have done the same. *E.g., People v. Hansleben*, 86 Mich. App. 718, 273 N.W.2d 539 (1978).

question of whether the hypnotically-aided testimony is credible or competent." (Pet. 20). Nothing suggests that any of those cases was influenced at all by the reasonable doubt standard. Moreover, the burden of proof for preliminary facts is not generally more stringent in criminal than civil cases. The preponderance of the evidence test applies to preliminary fact questions in either case. *E.g.*, *Nix v. Williams*, — U.S. —, 104 S.Ct. 2501, 2509 n. 5 (1984); *United States v. Matlock*, 415 U.S. 164, 177 n. 14 (1974); *Lego v. Twomey*, 404 U.S. 477, 488 (1972).[10]

Last, plaintiffs complain that the Eighth Circuit's decision enacts "a two-witness, or corroboration rule in civil cases where hypnosis is an issue." (Pet. 23-24). Plaintiffs say that corroboration is solely a criminal law requirement. That is false. Corroboration may be required by reason of (1) the charge or issue (not all of which are criminal) or (2) the kind of witness, irrespective of the issue. 7 Wigmore, *Evidence* § 2035, at 348 (Chadbourn rev. 1978). There is certainly good reason to require corroboration of a witness' hypnotically induced testimony; no one can tell whether the testimony is true memory or confabulation without checking it against other evidence. Indeed, even the North Dakota decision on which plaintiffs rely affirmed admission of the testimony in part because it was corroborated. *State v. Brown*, 337 N.W.2d at 153.

In any case, the Eighth Circuit did not lay down an ironclad corroboration requirement. It said that corrobora-

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[10] Plaintiffs' quotation from Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271, 305 (1975) is out of context, and that article does not support their distinction. It notes that the standard is the same in civil and criminal cases. It argues for a different standard only respecting confessions, dying declarations, and declarations against interest. That, obviously, has nothing to do with this case.

tion is a "factor" the district court "should take into account" in determining reliability and applying the Rule 403 balancing test. (App. A22; 771 F.2d at 1123) Do plaintiffs really contend that corroboration is not relevant to reliability?

C. Conclusion

The Eighth Circuit's decision was soundly based on relevant authority. Indeed, this is not just an antiseptic case. This is an egregious case. One must see it for what it was.

Rodney's deposition testimony did not fit plaintiffs' liability theory, so Rodney was sent to Texas to be hypnotized. The lawyer-hypnotist did business with plaintiffs' counsel. The hypnotist endorsed Dr. Orne's safeguards, but did not follow them. Rodney had a good memory of the accident, but the hypnotist was told he did not. The hypnotist was told there was (supposedly) "a problem with the brakes," so he knew what plaintiffs' counsel was interested in. The hypnotist's questions to Rodney (32 in ten minutes about feet and brakes) "undoubtedly" suggested to Rodney what he was interested in, and led him to it. Rodney was a teenage boy, and his mother had been badly hurt while he was driving their car. Before hypnosis he had heard there might have been some problem with the car's brakes. He hoped very much the accident was the car's fault, not his, so he followed where he was led, and no surprise; hypnosis plays on hopes.

To say the least, all those things made Rodney's hypnotically induced testimony "even less trustworthy" than it usually is. And add this: Rodney had a good memory of the accident, "striking" how complete, before hypnosis. There was no occasion to hypnotize him in the first place,

and no good end to be served by it. For where one has a good memory before hypnosis, the likelihood that a hypnotic memory replacing it will be more accurate "is so low you can virtually discount it."

Even the "moribund" *Harding* line only permits one who has lost memory before hypnosis to testify to a "refreshed" memory after hypnosis. *See, e.g., Harding v. State,* 5 Md. App. at 236, 246 A.2d at 306 ("lost memory"). We have found no case anywhere that permits one who has a good memory before hypnosis to testify to a changed memory afterward, and plaintiffs cite none. This should not be the first. Changing good memory by hypnosis offends the process of the court and compromises its integrity, particularly where the changed good memory was sworn to at deposition. And offends to no good end.

Certainly a federal court, whether sitting in diversity or not, is not precluded from dealing with that offense.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS TO BE RESOLVED

Plaintiffs argue that certiorari should be granted because the Eighth Circuit's decision conflicts with decisions of the Ninth Circuit on two grounds: (1) The Ninth Circuit applies state law to determine the admissibility of hypnotically induced testimony. (2) The Ninth Circuit admits hypnotically induced testimony without requiring any safeguards. (See Pet. 16-17). Neither proposition is correct.

A. Both the Eighth and Ninth Circuits Apply Federal Law in Determining the Admissibility of Testimony Affected by Hypnosis in Diversity Cases

Plaintiffs point to *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974) and *Kline v. Ford Motor Co.*,

523 F.2d 1067 (9th Cir. 1975). Both cases predate the Federal Rules of Evidence, and neither states whether it applied state or federal law. Since then the Ninth Circuit has made it clear that the Rules govern the admissibility of evidence in diversity cases. *Gibbs v. State Farm Mutual Insurance Co.*, 544 F.2d 423, 428 n.2 (9th Cir. 1976). Moreover, *Wyller* and *Kline* also apparently applied a federal rule.

Wyller was an Alaska case but does not cite Alaska law. It cites two cases from other states, *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969), and *State v. Jorgenson*, 8 Or. App. 1, 492 P.2d 312 (1971), neither of which is now good law.[11] *Kline* was a California case. It relies on *Wyller*, a federal case, not California law; and it ignores a California case critical of hypnosis. *People v. Ebanks*, 117 Cal. 652, 665, 49 P. 1049, 1053 (1897).[12]

The most recent Ninth Circuit case is *United States v. Awkard*, 597 F.2d 667 (9th Cir. 1979). It referred to *Wyller*, *Kline*, and *United States v. Adams*, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) as resolving the admissibility issue "in this circuit." 597 F.2d at 669. That is a reference to a federal rule, invariant from state to state within the circuit.

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[11] The same court that decided *Harding* repudiated it in *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272 (1982). *Jorgenson* was overruled by statute. Or. Rev. Stat. § 136.675 (1981).

[12] California now prohibits the admission of hypnotically induced testimony. *People v. Shirley*, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P.2d 775, *cert. denied*, 459 U.S. 860 (1982).

B. Both the Eighth and Ninth Circuits Require Safeguards in Connection with Testimony Affected by Hypnosis

Plaintiffs also claim that the Ninth Circuit rule is "directly opposed to the opinion of the Eighth Circuit herein." (Pet., 17). That is not so.

The Eighth Circuit rule requires the trial judge to determine reliability, taking into account whether appropriate safeguards have been followed in the hypnosis session. (App. A22-A23; 771 F.2d at 1122-23) The Ninth Circuit's approach is essentially the same. *See, e.g., Awkard*, 597 F.2d at 669 n. 2:

> "We have suggested procedures to be followed during hypnosis to ensure that post-hypnosis statements are truly the subject's own recollections. . . . Objections to the subject testimony on the ground that such procedures were not followed should be heard by the district judge before trial, or out of the presence of the jury on voir dire of the witness."

Accord, Adams, 581 F.2d at 198-99:

> "Great care must be exercised to insure that statements after hypnosis are the product of the subject's own recollections, rather than of recall tainted by suggestions received while under hypnosis."

Both circuits require the trial judge to determine the reliability of hypnotically induced testimony, taking into account the procedures followed in the hypnosis session. Thus, the circuits do not have "contrary positions," and there is no conflict between them.

IV. NEITHER RULE 601 NOR THE ERIE DOCTRINE REQUIRED APPLICATION OF NORTH DAKOTA LAW TO ADMIT RODNEY'S TESTIMONY

Plaintiffs contend that Rodney's testimony was admissible under North Dakota law and that Federal Rule of

Evidence 601 and possibly *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), required this diversity court to apply North Dakota law here. Plaintiffs are wrong on all counts.

A. North Dakota Law

Plaintiffs rely on *State v. Brown*, 337 N.W.2d 138 (N.D. 1983). Their reliance is misplaced. *Brown* held hypnotically induced testimony admissible where, among other things, (1) "a valid investigatory purpose existed" for the hypnosis because the witness lacked significant recall; (2) there were no "impermissible suggestions" in the hypnosis session; and (3) the hypnotically induced testimony was "corroborated by other evidence." 337 N.W. 2d at 152-53.

The opposite of those facts exists here. (1) Rodney had good, not lost, recall. (2) There were impermissible suggestions from beginning to end of this hypnosis session. (3) Rodney's testimony was not corroborated by anything.

Brown did not approve hypnosis that changes testimony sworn to by a witness whose memory is good, much less where the change is the work product of a session like this one. Therefore no Rule 601 or *Erie* issue arises to begin with—but neither applies anyway.

B. Rule 601

Rule 601 provides that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with state law." Plaintiffs contend that whether Rodney's testimony was admissible was a competency question, so Rule 601 and therefore North Dakota law applies (assuming the testimony would be admissible under it).

Plaintiffs' argument turns on the contention that "the Eighth Circuit is . . . bound by North Dakota's determination that the issue . . . does concern whether or not Rodney Sprynczynatyk was a competent witness." (Pet. 14) The idea is that in a diversity case "competency" in Federal Rule 601 means what the state says it means.

That is preposterous on its face. States do not determine what federal rules mean. And plaintiffs admit that no case supports their view. (Pet. 14) They rely entirely on a passage from 21 C. Wright & K. Graham, *Federal Practice & Procedure:* Evidence § 5056, at 278 (1977). But that passage concerns Rule 104, which relates to determination of preliminary facts by the court, not Rule 601. The passage simply says that there is an argument that the "state method of determining" competency or privilege should be followed. "State method of determining" does not mean how a state construes "competency," but what procedures a state court uses in adjudicating preliminary facts.

Wright and Graham elsewhere make it plain that state law ought not determine what "competency" means. Thus they opine that state law should not control what constitutes a "presumption" or "privilege" within the meaning of Rules 302 and 501, because the state characterization is likely to be "haphazard" or "off-hand" and not responsive to Congress' purpose. 21 Wright & Graham, *supra*, § 5136, at 668 (1977); 23 *Id.* § 5423, at 701 (1980). The same reasoning applies to Rule 601.

The Eighth Circuit did "not view this issue as a competency question but as an evidentiary problem within the control of the district court and governed by federal law." (App. A20; 771 F.2d at 1122.) That is correct. In Rule 601,

"competency" refers to basic qualifications to be a witness. ("Every person is competent to be a witness except as otherwise provided in these rules.") The question here was not whether Rodney possessed the basic qualifications to be a witness. *United States v. Valdez*, 722 F.2d 1196, 1204 (5th Cir. 1984); *People v. Shirley*, 31 Cal. 3d at 67, 181 Cal. Rptr. at 273, 641 P.2d at 805. It was rather what this competent witness could testify about. He could testify to his prehypnosis recollection. He could not testify, for example, to hearsay or some opinions. (Rules 701, 802) And he could not testify to what he was induced to say in that hypnosis session if the testimony's prejudicial effect outweighed its worth. (Rule 403) Rule 601 does not change Rules 701, 802 or 403. (As to Rule 403, see next paragraph.)

C. Erie

Even assuming a witness is competent under applicable state law in a diversity case, the trial judge retains power to exclude his testimony under Rule 403. *E.g.*, 10 J. Moore & H. Bendix, *Moore's Federal Practice* § 601.04, VI-19 (2d Ed. 1985); *see also id.*, at VI-27; 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 601[01], at 601-9 (1985). Plaintiffs appear to argue, however, that *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) undoes the Federal Rules. There is nothing to that amazing thesis.

1. *The Federal Rules are valid under Erie*

Hanna v. Plumer, 380 U.S. 460 (1965), holds that notwithstanding *Erie*, the Federal Rules of Civil Procedure apply in a diversity action unless a given rule exceeds the mandate of the Rules Enabling Act (28 U.S.C. § 2072) or the Constitution. *Id.* at 471. Congress enacted the Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975), so they "stand on even firmer ground than that of the

Rules of Civil Procedure," 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure:* Jurisdiction § 4512, at 192 (1982), and are presumptively valid under *Erie. Hanna*, 380 U.S. at 471. Congress obviously did not exceed its constitutional power to regulate the federal courts in enacting the Federal Rules of Evidence for federal courts. Rather, "since all of the Evidence Rules can rationally be viewed as rules of procedure (the constitutional standard announced in *Hanna v. Plumer*), they all clearly are constitutional." 19 Wright, Miller & Cooper, *supra*, at 193 (footnote omitted). Therefore the Rules themselves, the Rules of Decision Act (28 U.S.C. § 1652 (1976)), and the Constitution's supremacy clause mandate that they apply in diversity actions. *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 701 F.2d 1189, 1193 (7th Cir.), *cert denied*, 464 U.S. 866 (1983).

That is settled law. *E.g., McInnis v. A.M.F., Inc.*, 765 F.2d 240, 244-245 (1st Cir. 1985); *Warner v. Transamerica Insurance Co.*, 739 F.2d 1347, 1351 n. 6 (8th Cir. 1984); *In re Air Crash Disaster*, 701 F.2d at 1193 (7th Cir. 1983); *Joy Manufacturing Co. v. Sola Basic Industries*, 697 F.2d 104, 110 (3d Cir. 1982); *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1153 (5th Cir. 1981); *Gibbs v. State Farm Mutual Insurance Co.*, 544 F.2d 423, 429 n.2 (9th Cir. 1976); *United Telecommunications v. American Television and Communications Corp.*, 536 F.2d 1310, 1316 (10th Cir. 1976); *Rhodes v. Michelin Tire Corp.*, 542 F. Supp. 60, 61 (E.D. Ky. 1982); *Campus Sweater & Sportswear v. M.B. Kahn Construction Co.*, 515 F. Supp. 64, 98 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981); *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 690, 695 (E.D.N.Y. 1984).

2. *No case plaintiffs cite requires application of state law.*

Plaintiffs point to several diversity cases that (they say) have followed state evidence law. (Pet. 8-9) None helps them.

Most looked to state law to determine the materiality of evidence. Materiality is a substantive, not evidence, law question, governed by the states under *Erie*. 19 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction* § 4512, at 194 (1982). Thus, *Rexrode v. American Laundry Press Co.*, 674 F.2d 826 (10th Cir.), *cert. denied*, 459 U.S. 862 (1982), held industry safety standards inadmissible in a strict liability design defect case because "irrelevant" to provide a defense under a state substantive law. 674 F.2d at 831.[13] *Raney v. Honeywell, Inc.*, 540 F.2d 932 (8th Cir. 1976) and *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713 (8th Cir. 1976) likewise determined the materiality of expert testimony about inflation in connection with damages under state substantive law. And *Greiner v. Volkswagenwerk A.G.*, 540 F.2d 85 (3d Cir. 1976) held evidence of drinking without proof of intoxication inadmissible in a negligence action because immaterial under Pennsylvania law. *Fisher v. Dye*, 386 Pa. 141, 148, 125 A.2d 472, 476 (1956); *Morreale v. Prince*, 436 Pa. 51, 53, 258 A.2d 508, 509 (1969) (such evidence "has no role to play in any case"). But even if *Greiner* did apply Pennsylvania evidence law, it was tried before the Federal Rules of Evi-

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[13] *Rexrode* referred to *Fabian v. E. W. Bliss Co.*, 582 F.2d 1257, 1260-61 (10th Cir. 1978) as "adopt[ing] the position that State evidentiary law would be applied in determining the admissibility of industry safety standards in diversity strict liability cases," 674 F.2d at 831 n.17, but that was clearly just loose usage. *Fabian* did not concern the admissibility of evidence at all, much less what law controlled it, but a jury instruction.

dence were effective, 540 F.2d at 88, and decided under former Fed. R. Civ. P. 43(a), 540 F.2d at 90, which the Federal Rules of Evidence superseded.

Plaintiffs' other cases are beside the point. *Kirshner v. Broadhead*, 671 F.2d 1034 (7th Cir. 1982), said that testimony was inadmissible "under the standards laid down in either the Indiana case or the federal decisions." 671 F.2d at 1040. *Potter v. St. Louis-San Francisco Railway*, 622 F.2d 979, 983 (8th Cir. 1980) refused to apply a state case to exclude contested evidence. And *Olson v. Green*, 668 F.2d 421 (8th Cir.), *cert denied*, 456 U.S. 1009 (1982); *Jones v. Wyrick*, 415 F. Supp. 108 (E.D. Mo.), *aff'd*, 542 F.2d 1013 (8th Cir. 1976); and *Shaw v. Gathwright*, 487 F. Supp. 459 (E.D. Va. 1980) were *habeas corpus* proceedings reviewing state criminal trials, not diversity cases.

There is nothing to plaintiffs' *Erie* claim.

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CONCLUSION

The petition should be denied.

Respectfully submitted,

David M. Heilbron
James B. Lewis
Joseph M. Stockwell
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

McCUTCHEN, DOYLE, BROWN & ENERSEN

PEARCE, ANDERSON & DURICK

Harry J. Pearce
Christine A. Hogan
314 East Thayer Avenue
Bismarck, ND 58502
(701) 223-2890

John P. Raleigh

Of Counsel

Attorneys for Respondent General Motors Corporation

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